15. F. C.

A TREATISE ON THE Rules and Practice OF THE EQUITY SIDE OF THE EXCHEQUER in *IRELAND*;

WITH THE

Several STATUTES relative thereto.

AS ALSO

Several Adjudged Caſes on the Practice in Courts of EQUITY, both in *England* and *Ireland*, with the Reaſons and Origin thereof in many Inſtances as they aroſe from the Civil Law of the *Romans*, or the Canon and Feudal Laws;

And a

Compleat Index to the whole.

VOL. I.

BRITANNICUM

This Work is with all Deference moſt humbly inſcribed to the Right Honourable and Honourable, the *Chancellor*, *Treaſurer*, *Lord Chief Baron*, and the reſt of the *Barons* of the Court of *Exchequer*, by their

moſt devoted and
moſt obedient
humble Servant,
GORGES EDMOND HOWARD.

DUBLIN: Printed by OLI. NELSON, at *Milton's-Head* in *Skinner-Row*.
MDCCLX.

5

A

TREATISE

ON THE

Rules and Practice

OF THE

EQUITY SIDE

OF THE

EXCHEQUER in IRELAND;

WITH THE

Several STATUTES relative thereto.

The Reader is desired to alter, with his Pen, the Errors of the Press, as directed in the ERRATA at the End of the Work.

FH

MVSEVM

BRITANNICVM

THE INTRODUCTION.

AS almoſt all the Proceedings in our Courts of Equity, with their Modes and Forms of Practice, have been taken from the Civil Laws of the *Romans*, or from the Canon and Feudal Laws; or have been founded on the Reaſon and Policy of thoſe Laws; I have, therefore, in the following Work, for the Eaſe and Advantage of the Practitioners, and for their better underſtanding of our Equity Proceedings and Practice, endeavoured, in moſt Caſes, to point out where, and how they have been derived, and taken from any of the before-mentioned Laws, and the Analogy they bear to each other; for without a tolerable Knowledge of this, I will venture to ſay, it is next to an Impoſſibility, that the Proceedings and Practice of Equity can ever be underſtood.

I believe I may yet farther ſay, that without the Knowledge of the Laws I have mentioned, it is alſo as impoſſible to have a thorough Knowledge of the Common Law (moſt of the ancient Maxims of which are governed by the Feudal Law), or to un-

derſtand the Conſtitution of our Country; for that the ſeveral Laws I have before-mentioned, were alſo the principal Fountains of our municipal Laws, and of our Conſtitution, is a Matter too well known to be queſtioned: But the feudal Syſtem is connected with the municipal Law of *England*, more than with the Law of Nations; and formerly made a chief Part of it, though now reduced to a Shadow. And it is judiciouſly obſerved, by a late Writer upon the Feudal Law *(Dalrymple)*, That it carried with it not only a Syſtem of private Rights, which ſwallowed up all others wherever it came, but it alſo involved, in giving Effect to thoſe Rights, a Syſtem of Forms, which remain even when the original Rights are no more. And by an unaccountable Tenaciouſneſs in the *Engliſh*, to ſingle Points of Doctrine in their Law, there are many Regulations, which ſubſiſt to this Day, when their Genius and Circumſtances have made them overturn, in general, the Doctrines themſelves.

From this Conſideration, I have been often ſurprized to ſee Gentlemen of the Bar, and Members of the Legiſlature, entirely ignorant of theſe Fountains (if I may ſo call them) of our Laws. In *Scotland*, a Knowledge of them is (as I have been credibly informed) a Part of the Education of a Gentleman; and, that any Set of Men, unacquainted with the Conſtitution of their Country, ſhould ſet themſelves down to frame and form Laws for it; what muſt be the Reſult, but that which has, and does every Day happen, and ever will be the Caſe? Laws to alter others; Laws to amend; Laws to repeal; Laws—innumerable! And, that another Set of Men ſhould attempt to argue on a Body of Laws, the Spirit, Reaſon, and Policy of which

which they never knew, is as abſurd and vain to the full; and cannot but produce, what is too frequently the Caſe with the Profeſſion, that if two in an hundred be what may be called *eminent*, it is almoſt as much as happens.

It has many Times grieved me to think, that a Profeſſion, ſo honourable as that of an Advocate would be, were it purſued as it ought, ſhould ever, from Ignorance, Avarice, or Degeneracy of Manners, ſink into the leaſt Degree of Diſrepute or Contempt: And yet, how is it to be expected that it ſhould eſcape, if, as *Milton* ſays in his *Tractate upon Education*, the Profeſſors are allured to it only as a Trade, grounding their Purpoſes not on the prudent and heavenly Contemplation of Juſtice and Equity, which was never taught them, but on the promiſing and pleaſing Thoughts of litigious Terms, fat Contentions, and flowing Fees.

But alas! were theſe to be the only Conſiderations for entering into the Profeſſion, and their Education not to be extenſive, free, and liberal, and ſuch as I have mentioned in the *Preface* to my *Law Practice*, the Diſgrace of the Profeſſion would by no Means be the only Evil that attended it. Are they not the Perſons, on whom we are to depend for the Defence of Life, of Liberty, and Property? And are they not, one Day, to be the Judges of theſe ineſtimable temporary Bleſſings!

If, then, they ſhould not be ſkilled, and fit to execute this weighty Truſt, what muſt be the Conſequence! To the Public, heavy Miſchiefs; to themſelves, Shame, Diſhonour, and Contempt; and withal, eternal Chagrin, and conſtant Uneaſi-

neſs of Mind: For every Man cannot but know whether he is, or is not, ignorant of the Buſineſs of any Station or Profeſſion he undertakes. He may attempt to deceive others, and ſome few he may deceive; but himſelf he cannot. This muſt lay a Judge under the continual Apprehenſions, of being not only impoſed upon, but alſo drawn into Contempt and Sport; and has made Men, otherwiſe, in private Life, good-natured, gentle, and complacent, extremely peeviſh and intemperate on the Bench. ——A ſhocking Sight!

The *Scotch* had a Law, and which they ſtill endeavour to adhere to, not to admit any Perſon as a Judge, who had not been a practiſing Advocate for a certain Number of Years, ſufficient (it might be ſuppoſed) to qualify him for that moſt important Station.

We have, it is true, *an Appeal to the Lords of Great-Britain*; and a great Advantage it may be: But, as the wiſeſt Council that ever was on Earth have erred, I would not that our Judges ſhould pay ſo intirely an implicit Submiſſion to the Wiſdom of this Court, high as it is, as never to venture to pronounce againſt any of its Determinations, but to conſider them as infallible Precedents; for, were that to be the Caſe, the Remedy might be worſe than the Evil, by many Degrees.

The *Romans*, in the firſt Ages of their State, held the Profeſſion of an Advocate in the higheſt Eſteem; and the Seats of their Bar were crouded with Senators and Conſuls. They, whoſe Voices commanded the People, thinking it an Honour to be employed in defending them.

They

They were ſtiled *Comites Honorati*, *Clariſſimi*, and even *Patroni*; as if their Clients were not leſs obliged to them, than freed Men to their Maſters. But the Bar was not then venal. Thoſe, who aſpired to Honours and Offices, took this Way of gaining an Intereſt in the People, and pleaded *gratis*.

This, as it is now a Profeſſion for Livelihood, cannot be expected. And if its Profeſſors are properly qualified, and do for their Clients as they ought to do, there are no Labourers in the Community more worthy of their Hire; for there is no other Profeſſion whatſoever, where Abilities, Aſſiduity, a Knowledge almoſt as much as the Life of Man can compaſs, and every moral Perfection, are ſo much required, as in that of an Advocate in Law and Equity. How voluminous muſt thoſe Books be, in which our Laws are contained, when, O Shame to hear! the very Abridgment of them takes up no leſs, at this Inſtant, than three and twenty large Folio Volumes.

The Eloquence of the Bar is another Matter, it is to be wiſhed were properly ſettled. And here again, the abſolute Neceſſity appears, of a thorough Knowledge of the Profeſſion; for I will be bold to affirm, that there is not any Thing more impoſſible, than, that a Man ſhould explain or convey intelligibly to others, what he himſelf does not completely underſtand, be the Subject what it will. To pretend to plead, without theſe Advantages, is to attempt the raiſing of a great Building, without a Foundation.

From what I can collect from the beſt of Authors, and have heard from thoſe of my Time, moſt capable of judging, the Language to be uſed at the Bar ſhould be ſtrong and expreſſive, without Stiffneſs or Affectation, as ſhort and conciſe as the Nature of the Subject will admit of, without being either obſcure or ambiguous, and eaſy and flowing, and diſengaged, without one undetermined or ſuperfluous Word.

I have ſeen an Advocate at the Bar, in this Kingdom, who was a Model for that Kind of Oratory, which is alone fit for the Bar; and who, I believe, it is allowed, was never exceeded, if ever he was equalled: He had the ſhorteſt, cleareſt, eaſieſt Way of expreſſing his Thoughts by the moſt harmonious Arrangement of the beſt choſen Words, both for Meaning and Sound. He had that Knack of familiarly conveying his Ideas to every, even the meaneſt Capacity, that every Man who heard him might flatter himſelf he could ſpeak the ſame Way; but with ſuch Perſpicuity and Strength of Reaſoning, as I never before ſaw any Man poſſeſſed of within any Degree of him, and it is Five Hundred to One if ever I do.

The Adoration (if ſo I may call it) which was always paid to him, whenever he aroſe to ſpeak, was more than ever I ſaw offered to any Man, except his Father. All around him aroſe with him, as if they would not loſe a Syllable that fell from his Lips.——And ſo it is in the Senate-houſe.——

——————— *With grave*
Aſpect he roſe, and in his riſing ſeem'd
A Pillar

A Pillar of State: Deep on his Front engraven
Deliberation ſat, and public Care.
——————— His Look
Drew Audience, and Attention ſtill as Night,
Or Summer's Noon-tide Air, while ere he ſpoke.
MILTON's Par. Loſt.

He was always Maſter of his Brief; and never attempted to deceive, or impoſe on any Court, or to inſiſt, or perſiſt, when he knew his Client's Cauſe was not a juſt one; nor did he ever uſe the little Arts of Chicanery and Sophiſtry, or any Tricks or Cunning in his Pleading: His true Oratory needed them not, and his Candour abhorred them.

He was alſo abſolute Maſter of the Practice of the Courts, by conſtantly ſitting in them, inſtead of Walking the Hall, when he was at Leiſure. This brought him infinite Buſineſs; as it muſt to every Gentleman of the Bar, who underſtands the Practice well, whilſt Motions continue to be, as they are at preſent, at leaſt two-thirds of the Buſineſs of the Courts.

It is to be hoped, the young Gentlemen now at the Bar, who have had the Advantage of hearing him, will make him their Model, as an Advocate. A more perfect one no Nation ever produced; and he is equally ſo in the high Station he now ſo eminently fills.—In an Account I have met with, of the Life of Lord Chief Juſtice *Hale*, there is a Part of the Character of that great Man, ſo applicable to this Gentleman, that I cannot help inſerting it here.

" He

" He was (ſays the Author) ſincerely bent on " diſcovering the Truth and Merits of a Cauſe, " and would therefore bear with the meaneſt Coun- " ſel, ſupply the Defects of the Pleaders, and never " take it amiſs, when ſumming up the Evidence, " to be reminded of any Circumſtance he had " omitted, for being in a high Degree poſſeſſed of the " Qualification, ſo peculiarly neceſſary to a Judge, " I mean Patience (without which the moſt excel- " lent Talents may become inſignificant) no Con- " ſideration of his own Convenience could prevail " with him to hurry over a Cauſe, or diſpatch it " without a thorough Examination." Now I will venture to ſay, that there is not a ſingle Part of this Portrait, which will not be allowed by all who know the Gentleman I have here ſpoken of, to be as if it had been drawn for him, but to add withal, ſuch an uniform Dignity of Behaviour, with a Grace and an Aſpect, as if Nature had deſignedly formed him for the exalted Station he is placed in.

If any of our young Advocates, now growing up, have formed themſelves upon this moſt excellent Model, we ſhall then ſee an End of thoſe long winded Diſcourſes, formal Heſitations, and diſguſting Repetitions, of what the Speaker himſelf, or others before him have ſaid, with which the Ears of Courts are daily tortured; or thoſe ſtrange forced pathetic Exordiums, ſtuffed with attempted Flights of Imagination, and florid pompous Pictureſque, without the leaſt Connection, or Method, of late Years too often uſed at the Bar, eſpecially in the ſtating of Caſes, and this, ſometimes, on very trifling Motions, by ſuch, as either love to Talk, or ſeek to captivate. A ſpecies of Oratory, (if it at all deſerves

ſerves the Name) which the Bar has nothing to do with, and in a Court of Juſtice never ſhould be uttered; as it is an Abuſe of the Court, and a real Miſchief to the Suitors, by the great Delays it muſt of courſe promote.

Cicero ſays, (ſpeaking of thoſe who profeſſed Oratory in his Time) " That many of them employed " their Skill, rather to promote their own Repu- " tation and Applauſe, than to ſerve the real In- " tereſt of Truth and Virtue; for they propoſed " in an arrogant Manner to teach how a bad Cauſe " might be ſo managed, as to get the better of a " good one; that is, they would undertake to " charm the Ears, and ſtrike the Paſſions of their " Hearers in ſo powerful a Manner, by ſophiſtical " Reaſonings, turns of Wit, and fine Language, " as to impoſe Falſhoods upon them for Truth; " than which nothing can be either more diſinge- " nuous in it ſelf, or prejudicial to Society ".

In ſhort a prudent Man is not ſo deſirous to ſay a great deal, as to ſpeak to the Purpoſe, and therefore will make Choice of proper Arguments, and ſuch only which have a direct Tendency to confirm, or illuſtrate his Subject; and for this End, it is neceſſary for him firſt to gain a thorough Knowlege of the Subject, and then Arguments proper to ſupport it, will of courſe ariſe to him. A Gentleman now at the Bar, (Sir *Simon Bradſtreet*) in a long courſe of Attendance there, has moſt inviolably adhered to this Method of pleading and ſpeaking: To ſum up the Whole of this great Lawyer, in a few Words, He never ſays more in any Cauſe than is proper and neceſſary; his honeſt Heart, profound

profound Knowledge, and great Judgment will not ſuffer it, and as ſeldom leſs. It is to be wiſhed he had many Years more to live, than from the courſe of Nature can be expected. There are indeed a Set of young Men, now at the Bar, who are growing very faſt in their Profeſſion, and from whom much is expected.

There is another Kind of Oratory which I have alſo ſeen uſed at the Bar, by Men of Abilities and Knowledge, which has often rendered theſe two great Advantages but of little real Value to them; and that is, the making Points of every Thing, even of the ſmalleſt Conſequence; for when Judges are accuſtomed to this in a Man, they by Degrees drop their Attention to him, and Things the moſt material, paſs unheeded with the trivial.

As to their Behaviour to the Attornies of the Courts, it is as much beneath the Dignity of this Profeſſion to Court Attornies for Buſineſs, as it is becoming it, to behave to them as Gentlemen ought to behave; and let them ſtill but act in this Manner, and take Care to underſtand well the Buſineſs of their Profeſſion, and they may rely on it, that it cannot fail, but they muſt be courted for Advocates. Politeneſs and Affability ever flow from a humane good natured Heart, as ſurely, as ill Treatment, bad Language and Abuſe do, from Rancour, Peeviſhneſs, and Malevolence.

I have not as yet ſaid any Thing of the Morals, or the Religion of an Advocate; but that both of theſe are moſt eſſentially neceſſary to this Profeſſion, I will for the firſt refer to Lord *Bacon*'s Eſſays civil and moral, *l* 56 of *Judicature*, and to his

Speech

Speech to Juſtice *Hutton*, (would he had himſelf followed it) when he was called to be one of the Judges of the *Common-Pleas*; and to *Cicero* and *Quintilian*, and particularly the latter, where you will find this Subject treated, in all the Extent it deſerves, in the twelfth Book of his *Inſtitutions*. And as for the Neceſſity of Religion, I will venture to ſay, that the higheſt Morality that ever was taught on Earth, is far ſhort of that divine Syſtem of Inſtructions and Directions for the Rule and Conduct of Life, laid down in the *New Teſtament*, ſo heavenly and ſo perfect, as only the Perfection from whence it came could have formed it. But ſo far have the Youth of this Age been from thinking Religion as neceſſary in the Profeſſion of the Law, that it is become a Faſhion now to commence Free-thinkers, or at leaſt Scoffers of all revealed Religion, from the Inſtant they commence Templars, and to look on the Attendance of public Worſhip as a Matter no Way neceſſary, and as the Loſs of ſo much Time; and thus do many of them proceed during the whole Courſe of their Lives.

That any reaſonable Man can thus ſuffer himſelf to be led away, and blinded abſolutely, and to his own eternal Perdition, from the Power of a prevailing Humour, or in compliance with a ſenſeleſs Faſhion of the Times. If (as a great Author ſays) Free-thinking tends to Atheiſm, were the Arguments for and againſt a Deity equal, who with the leaſt Pittance of Reaſon, but would take the Side of the Queſtion, where, if he erred, he would loſe nothing, in preference to that, where, if he be miſtaken, he is undone for ever? If it tends to Deiſm, or a diſbelief of revealed Religion,

to

to what End is it? Would theſe Men, to ſhew their Learning and ſuperior Wiſdom (as they vainly imagine) deſtroy the Credit of Tradition, and the only true and perfect ſyſtem of Morality that ever exiſted, and which the Spirit of God only could have dictated, diſturb the Minds of the People, and overturn the whole Peace and Order of Society?

From hence it is, that ſo few of this Profeſſion are ever ſeen in the Temples, even on the *Sabbath-Day*. Some indeed put it upon Neceſſity from a hurry of Buſineſs which might be fatal to others, if it were neglected; what Excuſe this may be hereafter, or how it may be received, is more than I ſhall undertake to diſcuſs: But I believe there are few will venture to ſay, it will be any to thoſe, if ſuch ſhould be, who have ſpent many Hours in the preceding Week, in which the ſame Buſineſs might have been done, in Idleneſs, Pleaſure, and perhaps Intemperance. And how baneful muſt the Example prove, if Men of Learning, and Perſons of Diſtinction, Station and Fortune, ſhould not only not pay that due Regard to the *Sabbath*, which the Laws, which they themſelves, are concerned in Framing and are to enforce, require and command, but ſhould alſo violate them openly and publickly: Can it be expected, but that the lower Claſſes of the People will look upon Religion (as ſome of the late poiſonous Writers have, as wickedly as falſly termed it) a meer Piece of State Policy! And if that ſhould ever grow to be the Caſe, do they imagine that any human Laws already framed, or which the Sagacity of Man can poſſibly contrive, would keep the Wicked in Awe? Muſt it not be univer-

univerſally allowed, that there are many Actions might be committed in the Dark, where the Eye of Man could never penetrate, which the Eye of God alone prevents! Is there not great Reaſon to think we are on the Brink of this being the Caſe; to ſee our Places of public Worſhip frequented chiefly by Women, and a few old Men.

The Length of the Services in our Church, has been alledged by ſome as an Excuſe; who ſay, that if they were ſhorter and more connected than they are, it would induce Numbers to go, who now ſtay away, thinking it next to an impoſſibility to keep their Attention engaged, for ſuch a length of Time, with the Strictneſs which is moſt properly required in Prayers; that the many Repetitions of the ſame Prayers, and of the ſame Things in Prayers, may lead Men to employ their Thoughts on other Objects, and therefore think it more fit to ſtay at Home, and pray in their Cloſets. That it is extremely difficult, even in private Prayer, to keep our Thoughts from wandering, even for a few Minutes, and that it muſt be much more ſo in publick Prayer, which laſts for Hours, and where the Avocations are innumerable; but theſe are Matters much fitter for the Exerciſe of Divines, or of the Convocation, than of my Pen, and to that learned Body I leave it.

And where Religion is, there will Truth be alſo, which is the laſt, but not leaſt valuable Qualification, I will recommend to the Gentlemen of this Profeſſion. A proper Zeal in an Advocate for his Client, when adorned with Truth, is moſt laudable; but if Zeal for the Succeſs of a Client, or an Earneſtneſs to gain Clients, ſhould lead him into the baſe

baſe Frauds of *Chicanery*, or ſhould carry him ſo far as to miſrepreſent a Fact, or to affirm that to be a Fact, which he knows to be otherwiſe, or (which is equally bad) of which he has no Knowledge at all, or in which he never was inſtructed, it would then be infernal Wickedneſs: To ſee two Gentlemen of a Profeſſion, ſo honourable as this would be, were it but in the Way it ought to be, affirming (as it ſometimes happens) diametrically oppoſite to each other, and this on a Matter of Fact; alſo mixing with the Paſſions of their Clients, and in the ſtrongeſt Convulſions of both Mind and Body, is really horrid to behold; for, that in ſuch a Caſe, they can both ſpeak Truth, is metaphyſically impoſſible, *&c.* and ſhould the Falſhood happen to prevail, the fair Suitor may be ſtripped of his Right. In ſhort, this Evil is come to ſuch a Paſs, that now a-days there is ſcarce any ſuch Thing, as knowing what is Law, from what is not, or what is Truth, and what is not.

What an Opinion muſt the Author of *Hudibras* have had of this Profeſſion, when he drew the dreary Portrait of it, in the ſecond Vol. of his Remains. But indeed, it rather ſeems to be the Breath of Anger, Malignity, and Invective, than of Truth, or any Intention to correct or reform.

As for the unfortunate Part of the Profeſſion, of which I am a Member, (unfortunate, as it is attended with Diſhonour, and the Contempt even of the loweſt Mechanick, nay, the very Sound has Obloquy in it; whereas, if it were properly regulated, it would be quite otherwiſe, and would merit Credit and Honour) I have already, in my Preface to the Practice of the Law Side of this Court, ſaid every Thing

Thing I could think of, to promote a Regulation of it; but although ſeveral of the beſt Judges of theſe Matters, and in whoſe Power it is to compaſs this good Work, have approved of the Scheme I have there propoſed for it, and think it would be of infinite Advantage to Society, yet I do not ſee the leaſt Likelyhood of any Attempt being made for the Purpoſe.

It is true, there are but few Inſtances of Attornies, (conſidering their Numbers) being publickly cenſured, or ſtripped of their Gowns; but that a thouſand little ſorry Acts of Cunning, Fraud and Knavery, are committed every Day, by many of the lower Sort of them, which unfortunately never come to be canvaſſed or expoſed, either from the Expence that would attend it, or the Inſignificancy of the Value of the Miſchief, is too well known to be denied. And when any wretched Client falls into their Clutches, inſtead of thinking of recovering, or defending his Property, they are ſure to uſe the whole of the little Art and Craft of the Profeſſion, in ſpinning out the Cauſe to all the Length they can, and to make the moſt of it, by innumerable, unneceſſary, wrangling Motions, on every trifling Neglect or Miſtake, in meer Points, or Forms of Practice, no way relative to the real Merits of the Cauſe; but how can this be otherwiſe, whilſt Perſons of the meaneſt Rank, without Six-pence to ſupport them, or the leaſt Degree of Education, are every Day admitted Attornies.

Many an excellent Handicraft's Man, and Mechanick, have been loſt to the Publick, by the Folly, Blindneſs, and Vanity of Parents, in placing to Pro-

 feſſions,

ſeſſions, and endeavouring to make of their Children, what Nature never meant them for: And of all Profeſſions, there is not one, where ſuperior Abilities, Education, ſolid Judgment, great Activity, Perſeverance, good Health, an almoſt inexhauſtible fund of Spirits, and other Advantages, of which altogether, not one in twenty thouſand is poſſeſſed, are more requiſite.

I do verily believe, if all the Caſes were known and collected, where Cauſes have miſcarried, or wrong Determinations have been given therein, from the Ignorance or Corruption of thoſe who were employed in the conducting them, they would fill as large a Volume as is now extant, in either Law or Equity; and as for their Ignorance, it is encreaſing every Day, and has been ſo theſe ſeveral Years, eſpecially ſince the Law Proceedings have been in *Engliſh*, which has cauſed a moſt viſible Alteration in the Profeſſion, for the worſe.

When I went an Apprentice to the Profeſſion of an Attorney, for one Gentleman's Son of any Fortune now put to it, there were then five; nor is it to be wondered at, whilſt not the leaſt Pains or Care are taken to correct, or regulate it, by thoſe who have it in their Power to do it; and whilſt it labours under the many Diſadvantages, (of which I have mentioned ſeveral in my other Preface) and the ill Treatment it is daily ſubject to. I am convinced, that many People think an Attorney unreaſonable, if not diſhoneſt, if ever he demands any Thing, even for his Labour, which, if he has any Degree of Buſineſs, and does his Duty, is not exceeded, if equalled by any Drudge in Society; and this Abuſe flows frequently from thoſe, who, in their

their own Occupations and Spheres, are robbing and plundering others, either the Publick, or Individuals, every Day of their Lives; but it is the Cry, and the Station is low.

When publick Offices ſhall be built together, and Officers obliged to certain Hours of Attendance, a ſober, honeſt, diligent Attorney, may then have a ſomewhat better Life; and better would it be again, if their Clients did but think their ſevere Labour was really worthy of any Hire. It is an ill judged Thing in Attornies, to put the Fees they pay to Lawyers, and to Offices into the ſame Bill with their own ſorry Emoluments; for generally, Clients look upon the greater Part of the Sum total, to be the Attorney's Profit, whereas, it is ten to one, if his real Profit be one ſixth part of the Bill. And if he advances the Money to Lawyers, Offices, and Six Clerk, (which is often the Caſe) it is well, if, after paying his own Clerks, he has the Intereſt of his Money, without any thing for his own Labour. I know that this has happened to be my Caſe, more than once, after having been a long Time kept out of the Money, and in the End paid with ill Will.

The only Advantage worth prizing, that I could ever find this Profeſſion has, is this, If an Attorney behaves properly, and Acts with Honeſty, it will not be in the Power of any ſingle Perſon, who bears him a grudge, nay not of ſeveral, to hurt him much: Whereas, in ſubordinate Civil Employments, there is in moſt Men ſo ſtrong a Diſpoſition to exert highly any little Power they are poſſeſſed of, or to lay hold of it to gratify private Reſentments, Diſlikes, or Prejudices, whenever they can, that it

is hardly poſſible for any but baſe and ſervile Spirits, or the moſt wretched Poverty, to bear the Inſults, Whips, and Scorns, they may be daily ſubject to. Beſides, the Sallaries annexed to moſt of theſe Employments, are, from the Change of Times, the encreaſe of Trade and Buſineſs, but eſpecially the prodigious Encreaſe in the Prices of Proviſions (almoſt treble what they were when the Sallaries were firſt fixed) ſo inconſiderable, that they are no Recompence for the Labour required, and hardly ſufficient to ſupply the common Neceſſaries of Life.

Another Matter very worthy of Conſideration is, the Privilege an Attorney has; it is a very extenſive Privilege, and it is fit it ſhould be ſo; at the ſame Time it ſhould be conſidered, that it was originally given to Attornies, not upon their Account, but for the Benefit and Advantage of their Clients, who otherwiſe might be great Sufferers; but the Uſe that is made of this Privilege, by the lower Sort of the Profeſſion, is terrible to Society, and calls loudly on the Legiſlature to prevent it, (if the Judges cannot do it, which I think is fully in their Power, as is mentioned in my Preface to the Law Side of the *Exchequer*) by properly regulating the Profeſſion. They are in all Civil Actions free from Arreſts, except upon an Execution: They are to be ſued in their own Courts, and by the Indulgence of the ſeveral Officers of the Court, in the General they pay no Fees, not even if they recover them from the oppoſite Party. Relying then, and on theſe Advantages preſuming, few of theſe lower Sort of Attornies pay any thing they owe; and unleſs the Demand be conſiderable, who in his Senſes would engage with ſuch an Attorney?

I may

I am ſure what I have here ſaid, cannot offend any honeſt worthy Gentleman of the Profeſſion, (and it is well known, there are ſeveral as much ſo, as in any other Profeſſion whatſoever) as to others, I am quite indifferent as to their Thoughts of the Matter.

Suſpicione ſi quis errabit ſua,
Et rapiet ad ſe, quod eſt commune omnium,
Stulte nudabit Animi Conſcientiam.

Phædr.

The Grievance is, that in the general Odium, which attends the Profeſſion, the innocent are in ſome Meaſure involved with the guilty, and often treated with the greateſt Rigour and Injuſtice.

It would be greatly in the Power of ſuch of the Profeſſion, as are in Eſteem, and much to their Honour, to promote the good and wiſhed for Work of reſtoring it to ſome Credit, by meeting together, and repreſenting to the Judges, the ſeveral Abuſes that have long been, and are daily growing in the Profeſſion, with ſome Scheme or Propoſal, for remedying the preſent, and for preventing future ones. And at the ſame Time to eſtabliſh ſome Fund, for the Relief of the diſtreſſed Families of Attornies, who ſhall die in poor Circumſtances. But alas! this is a kind of Spirit, from which this Nation, above all others upon Earth, ſeems moſt eſtranged. There is one unlucky Cuſtom here, which I have alſo mentioned in the aforeſaid Preface to my former Work, as too generally prevailing among us, which leaves no time to ſpare for Acts like theſe,

and until it is aboliſhed, it is impoſſible that this Kingdom can flouriſh.

It is now the only civilized Place on the Globe, where this vile Cuſtom of deep drinking is continued; if it has abated any Thing, it is but ſince the exceſſive Gaming, which has been practiced here of late, was introduced, and which is alſo now amongſt all Ranks of People. Dreadful alternative! and terrible to Thought, that we can only get the better of one Evil, by plunging thus into another.

In my ſaid other Preface I alſo mentioned ſeveral Things, which in our Laws, and the Execution of them, and the Practice of the Courts, it is univerſally allowed, much need correction and amendment. I have here ventured to ſet down ſome few more that have ſince occurred to me; as alſo ſome further Hints to ſome of my Brethren, and likewiſe the Officers of the ſeveral Courts, for their better Conduct in their ſeveral Buſineſſes.

The Law of Uſes and Truſts, is at this Day almoſt as difficult to underſtand, as when it was at firſt contrived; and there is not any Thing more uncertain, than when a Uſe is executed by the Statute of Uſes; and in Proportion to this Uncertainty, muſt the Security be in the Alienation of Property, the Jointures of Widows, and Proviſions for Children: For by the Uſe not being executed, there may not be a proper Tenant to the Præcipe in a Recovery, and of courſe the Eſtate Tail not docked, all which may not appear until after a Number of Years, and many Family Settlements made: And of this I have myſelf ſeen a recent Inſtance in a Family in this Kingdom, on a Recovery ſuffered near one hundred

hundred Years ago, and ſeveral Recoveries ſince, all under the Inſpection and Advice of the ableſt Lawyers that were in this Kingdom, in the Times they were tranſacted, and there has been no Period in which there has been more able ones.

The great Uncertainty there frequently happens in the Conſtruction of Powers and Proviſoes in Marriage * Settlements, is another no ſmall Grievance. I have in my Courſe of Buſineſs, met with ſeveral Caſes, where from the ambiguous, dark, and uncertain Manner in which theſe Powers have been penned, it has puzled ſome of the moſt eminent Counſel in the Kingdom, to ſay, whether a Daughter is, or is not intitled to her Portion on her Marriage, or at what Time ſhe is intitled; or if it can be raiſed during the Life of her Father; or how it is to be raiſed, or how, or in what Manner, or by what Conveyance a Sum of Money is to be raiſed, which a Tenant for Life was, by the Original Agreement, to have a Power to raiſe. And if it ſhould become neceſſary to apply to a Court of Equity, for any of theſe Purpoſes, there are ſo many Parties to be made, and the Expence of Law Suits ſo prodigious, that unleſs the Demand be ſomewhat conſiderable, it were better never to attempt the getting it. Should not all theſe Powers, for the Sake of the Peace of Families, and for the Credit of the Law, be ſo explicitly and clearly penned, as to anſwer fully the Intention of the Parties, and to be free of every Doubt and Difficulty.

* Theſe Family Settlements, by which, the firſt born Son ſhall inherit the Eſtate, were founded on Part of the Policy of the aforeſaid Feudal Law, long ſince aboliſhed; and have been the bane of many of them. They prevent Emulation, and often deſtroy all Honour, Love and Duty to Parents.

I alſo mentioned ſome Matters in my ſaid other Preface, which I thought of ſome Weight, in Regard to the preſent Method of examining Witneſſes; the little Care there is taken in preſerving the Depoſitions, and the fatal Conſequences attending theſe Neglects. I will only add thus much further, that I am moſt fully convinced, that a very ſkilful Agent with two ſkilful friendly Commiſſioners, may, with the Help of ſuch Evidence, as is ſeldom wanting here, make an extreme bad Cauſe appear in a quite different Light, from what it really is; on the Miſchiefs of which, I believe, I have no Occaſion to enlarge, they are too glaring. Suppoſe half a dozen Gentlemen of ſufficient Property, who have been bred to Buſineſs, and of undoubted and approved good Character in each County in the Kingdom, and always reſident, were appointed by the reſpective Courts, as their Examiners in ſix of the principal Towns of the County, one in each, at proper Diſtances, with ſuitable Allowance for their Trouble.

I alſo ſubmit it to the Conſideration of the Legiſlature, if the Members of either Houſe ſhould have a Privilege, except for their Perſons, in any Proceedings, either at Law, or in Equity on Judgments, which are the common Security of the Kingdom, or on Mortgages. By its being ſo, to my Knowledge, Money has been often refuſed to Men of the largeſt Fortunes, and of the beſt of Characters, who have been either Lords or Commoners.

It is alſo well worthy of Conſideration, if on Bills to foreclose Mortgages, the Plaintiff ſhould not

not be paid every Six-pence he hath neceſſarily expended thereon; for in getting only the common taxed Coſt, between Party and Party, what with the Croud of Parties it is often neceſſary to make, ſeveral of them perhaps *for Conformity* only, (as it is ſtrangely termed) and the infinite Delay, that muſt for that Reaſon, if there were none others, of courſe attend theſe Suit, if the Sums be not a large one, the Mortgagee had by far better ſit down at once with the firſt Loſs: Beſides, ignorant People are from hence inclined to think, that the Courts are not diſpleaſed on theſe Occaſions, as they get rid of preſent Trouble by theſe Objections for Want of Parties, too often founded in mere Forms. If ſomething be not ſpeedily done, to remedy this every Day growing Evil, it will at length come to that Paſs, that not any Man in his Senſes will lend his Money on any Security in the Kingdom.

The Power the Six Clerks and Attornies have in Courts of Equity of iſſuing Attachments, and in the firſt Inſtance, arreſting a Defendant for Want of an Appearance, or for Want of an Anſwer (either of which may be, and generally is, owing to the Neglect of the Attorney or Agent concerned for him, or the Non-attendance or Abſence of ſome of the Officers of the Court) may be attended with great Inconvenience and Miſchief. It is a Power too great to truſt in the Hands of ſuch under Officers, and has been much abuſed of late. The Credit of a Man may be for ever ruined by it; and it can anſwer no End to do it in this early Way, but to put Money into the Pockets of Officers, or to gratify an ill-natured, evil deſigning Plaintiff. It loudly calls for Regulation; nay, for Reſtraint.

By

By an Act of Parliament, made in *England*, in the twelfth Year of his preſent Majeſty's Reign, No Attorney there ſhall, in his own Name, or in the Name of any other, commence or proſecute any Action, or Suit (except Suits commenced before his Confinement); and all the Proceedings in ſuch Action, or Suit, ſhall be void and of no Effect; and ſuch Attorney ſhall be ſtruck out of the Roll, and incapacitated from acting as an Attorney; as ſhall alſo any Attorney, making Uſe of his Name.

Would not this Act be of infinite Uſe in this Kingdom alſo? where there have been many Grievances in this Way, committed by ſome of theſe poor Wretches, who, to gain a ſorry Fee, or get a *gratis* Meal, make it their Buſineſs to ſpirit up all the beggarly Priſoners in the Gaols with them, on whom they can prevail, to perplex and harraſs others, and put them to immenſe Expence at Law, for old, imaginary Demands, or Claims.

I have alſo, ſince the Publication of my ſaid former Preface, ſeen ſome Inſtances of fatal Conſequences, which have attended, and ever muſt be the Caſe, of Attornies or Notaries Public taking upon them, unaided by Counſel, to draw Deeds and Wills. It is no more the Buſineſs of either of them, than it is the Buſineſs of a common Maſon, to draw the Plan of a Palace, or of an Apothecary to preſcribe in Phyſic. That a Man ſhould attempt to form various Eſtates, to create various Uſes and Truſts, and diverſe Limitations of theſe, who is an utter Stranger to their Doctrine and Principles; ought he not, in Conſcience, and in Juſtice, to anſwer for

or all the Miſchiefs to Families, his Ignorance and Preſumption muſt moſt inevitably cauſe? I do verily believe that from hence, one third of the Buſineſs of the Courts is produced. Let the one atteſt, proteſt, and ingroſs; let the other tranſcribe and ingroſs the Drafts of Counſel, and conduct his Cauſes through the various Mazes of Practice; and they will then act in their reſpective proper Spheres.

In *England* there are Chamber Counſel, who lay themſelves out entirely for theſe Purpoſes, and ſeldom or never attend the Courts: They are alſo employed in drawing the States of Caſes, and often in preparing the Briefs for Trials and Hearings; eſpecially in all Matters of any Difficulty or Importance, and moſt properly. It is impoſſible that Attornies, at leaſt as they are at preſent reared, can do theſe Things as they ought to be done; and on their being properly done, depends in a great Meaſure the Event of every Cauſe.

I alſo, in my former Preface, mentioned the ſevere Grievance of the Fees of Offices and of Counſel, and the terrible Delays which may be taken Advantage of, in the Proſecution of our Laws; but that for ſeveral of them I knew of no Remedy in a Country of Liberty. They are a Part of thoſe Conſiderations, which, for a free Conſtitution, we muſt ſubmit to pay; but yet, if ſome of theſe Inconveniencies were confined to the Strictneſs of them, and not ſuffered to be carried further than they are in themſelves, the Grievances would not be near ſo bad as they are. And this the Legiſlature can do, without invading or infringing the Liberty of any Man; and the Judges, in their reſpective Courts, could do a great Deal towards it.

For

For Inſtance, the Legiſlature could, by Act of Parliament, ſettle and eſtabliſh the Fees of the ſeveral Offices, and fix certain Hours of Attendance for the ſeveral Officers, which would be a moſt uſeful, beneficial Work, and would in a great Meaſure, if not entirely, put a Stop to many of the unreaſonable Exactions too often uſed by lower Clerks in Offices, in making the unfortunate Suitors pay for receiving Pleadings, after what they are pleaſed to call the *Office-Hours*, when they themſelves have been idling and abſent from their Offices whole Evenings; and may not a bad Man, for the very Purpoſe, keep out of the Way? But (which is not to be endured) all theſe terrible Exactions, Extortions, and Fleecings, are by ſome of theſe lower Gentlemen maintained as warrantable, from a Syſtem of new Rights, by themſelves invented, or created and eſtabliſhed, under the ſeveral Denominations of *Expedition*, *Preference*, *extraordinary Care and Trouble*, *after Office-hours*, *&c. &c.* and of which they are themſelves the Judges, *ad periculum Querentis*.

There are, it is true, Tables of Fees ſet up in every Office, which Fees were once, returned to the Houſe of Commons, upon an Order for that Purpoſe, but nothing further done. But is not the Explanation and Conſtruction of theſe Fees entirely in the Officers themſelves? And is there any Thing whatſoever more uncertain, or leſs known? In truth it has been ſometimes much abuſed.

For the Purpoſe, every Pleading and Affidavit in a Cauſe, which contains more than Half a Sheet of Paper, is always copied in wide Lines, Sheet-ways as it is called; and theſe Sheets are to contain, in

in ſome Courts, fourteen, and in others but twelve Lines, and each Line but ſix Words: And for each of theſe ſuch Sheets the Suitors are to pay, in ſome Courts Six-pence, and in others Eightpence; and for all this, there is not any Law, that I ever heard of, other than the Laws of *Will and Intereſt.* But this is not all; the lower Clerks, who make out theſe Copies, are, for their Trouble, to have a certain ſmall Portion of this Six-pence, or Eight-pence; and they it may be well ſuppoſed, will make the moſt they can of theſe Copies: Wherefore, I have frequently ſeen but three or four Words in a Line, and in ſome of the Courts in this Kingdom, the Copies of the Proceedings in a Cauſe, have been bound up, in ſeveral large Folio Volumes, and brought on the Backs of Porters to their Hearings, but this is alſo in ſome Meaſure owing to the Method uſed in thoſe Courts, in taking down the Depoſitions of Witneſſes. As for the Gentlemen now poſſeſſed of public Offices, they found the Fees of them as they now ſtand; have in the general purchaſed their Employments of others, and paid largely for them; ſo that it is hardly to be expected but that they will make all that they reaſonably and juſtly can of them; much leſs, that they will remit, or abate.

There is not any Nation upon Earth, where Lawſuits are ſo tedious, and ſo expenſive, as in this poor Kingdom (as yet but in the Infancy of its thriving) let the Right be as unqueſtionable as it may. In *England*, Suits are generally determined in Quarter the Time they are here, and at one Quarter of the Expence; but there are Counſel there confined, or who confine themſelves to particular Courts

Courts, and it is a rare Thing to ſee more than three Counſel on a Side, except it be in ſome very extraordinary Caſe; in common ordinary Caſes, ſeldom more than two. And the Courts there are not pleaſed at ſeeing many Counſel on a Side, and will ſhew it, by ſaying, They are already poſſeſſed of the Cauſe, and will deſire, that nothing more, that is not new, may be added.

But it would by no means anſwer, to have them here confined to Courts; the *Exchequer* there, is chiefly converſant about the King's Revenue only, and the Buſineſs which ariſes thereon; here, it ſhares the Equity Buſineſs of the Kingdom, with the Court of *Chancery*, which almoſt makes it abſolutely neceſſary for the Suitors (if the Cauſe be of conſequence) to employ a number of Counſel; for if they were to employ but two or three, they may when a Cauſe is on in one Court, be engaged in another; then, as every one of them muſt ſpeak to the Cauſe, and as they are often not in the way, to hear what others have ſaid before them, the Repetitions are frequently extremely tireſome and diſguſting: And this often is the Caſe, even upon Motions, where Notice is neceſſary, how frivolous ſoever the Matter may be; ſo that ſhould the Cauſe be of Conſequence, and of long Continuance, only a Treaſury could ſupport it, or ſuch a Purſe, as *Fortunatus* in the old Romance, was gifted with.

And, what is ſtill worſe, often upon theſe Motions, the whole Merits of the Cauſe, nay, ſometimes the Subſtance of all the Pleadings are ſet forth in voluminous Affidavits, and ſtated by the Counſel, though in no Sort eſſential to the Motion; which

which too frequently produces Wrangles for Hours, whether the Merits are, or are not, to be gone into; ſo that the Time of the Court, perhaps for a whole Term, ſhall be taken up with theſe without hearing, it may be, one Cauſe of any Conſequence, to the manifeſt Ruin of the Suitors. By examining the Books of Hearings and Notes for twenty Years paſt, this grievous Miſchief will appear moſt evident. Why ſhould not ſuch an Affidavit be referred for Prolixity and Impertinence, and if reported ſo, the the Attorney who drew it to pay all the Coſt out of his own Pocket? as he ſhould in all Caſes, where he puts his Client to unneceſſary Expence, either from a contentious Spirit, Miſtake, or Neglect. A few Examples of this Kind would quickly remedy much of the Miſchief I am complaining of; and it would alſo help greatly, if the Rules and Practice of the Court were certainly eſtabliſhed, ſo that it might be known what they really are: Perhaps theſe Works of mine may promote it.

This is not a pleaſing Portrait, but it is fatally too true; and I am convinced there is not any Gentleman at the Bar, who has any Humanity, or the leaſt Regard to his own Poſterity, but muſt moſt heartily wiſh theſe Evils could be remedied. And I am ſatisfied, there are at this Inſtant, as many Gentlemen of this Profeſſion of Learning, Worth and Honour, in this Kingdom, as ever were at any Time, in any Place whatſoever. They are the chief Speakers in the great Council of the Kingdom; how great, how glorious would it be, if they themſelves contrived to get ſuch of theſe Evils prevented, or remedied by Parliament, which it is not in the Power of the ſeveral Courts to effect?

The

The late Civil Bill Act for the City of *Dublin*, when it's Advantages are well known, will be found of great Uſe to it, in preventing the terrible Grievance of recovering ſmall Debts at much more Expence and loſs than the Value of them, though it is at preſent almoſt totally neglected. The Reaſons given are various: Some ſay it is much owing to the lower Claſs of Attornies, which is at leaſt two thirds of the Profeſſion; that theſe moſtly exiſt by Suits for ſmall Sums, and that, putting the Profeſſion out of the Queſtion, and conſidering them as Men, (who are and will be the ſame in every Profeſſion when ſelf Intereſt is in Queſtion) it is not to be ſuppoſed that they will deal in theſe Civil Bills, if they can avoid it, a Suit on one of which is to laſt but a few Minutes, and but a few Shillings to be got by it, when they have other Courts to reſort to, where Suits may laſt for Months, nay Years, and Pounds to be acquired by them: But this I am convinced is not any Thing near ſo much ſo as is imagined.

Another Reaſon given, is, that by the Act, *Where the Debt does not exceed ten Pounds, the Sum decreed is at firſt to be attempted to be levied of the Goods, and the Perſon not to be arreſted until three Months after a Copy of the Decree is ſerved on the Party.* Now, this ſeems to me to be but a mere Pretence; for I cannot be perſuaded, that there is in Mankind ſuch an Appetite or Spirit for Revenge, or ſuch Malevolence, as to confine in a wretched Gaol his Fellow-creature, who has no Effects where-with to pay his Debt; but if ſuch a Spirit does exiſt, it is the Wiſdom of the Legiſlature, that it ſhould be reſtrained.

I am

I am inclined to think, that the chief Reaſons for the Neglect of this Method of Proceeding are theſe; The much greater Part of the ſmall Trade of this City (for in Truth it is but very ſmall, let Perſons think as they will) is in the Retail Way, the exporting or importing Merchants, much fewer than I could wiſh they were: Of Courſe, then, the Buſineſs and Dealings of theſe Traders muſt lie much among Gentlemen, whom, (let them keep from paying as long as they pleaſe) it may not be convenient or prudent to diſoblige by any legal Proceeding. The Power, the Intereſt, and Connections of one Perſon of Fortune might hurt the beſt eſtabliſhed Trader in the City, if exerted againſt him. Another Reaſon is, that the Buſineſs, which is among the Tradeſmen and ſmall Dealers themſelves is, and has been, carried on for many Years, to the Knowledge of every one, almoſt entirely by a Chain of Credit. Now, if the great Men, or Men of Fortune, have not Money to pay, how can the ſubordinate Ones diſcharge their Debts? And ſhould they attack one another, by any Proceſs of Law, like Ninepins, the Fall of one might bring down ſeveral, and the Gaols of this City be ſoon filled, were they three Times as large or numerous as they are: So that, taking it in this Light, there rather ſeems to be a prudent, good-natured Compact among the Citizens themſelves, to wait until the main Spring moves. It has often ſurprized me, how many of them ſtand their Ground as they do, conſidering how they are paid. I am convinced, that one Half of their Time is taken up in fruitleſs Attendances at the Doors, or in the Halls of their Employers: And, as Gaming has arrived

at the ſinful, ſcandalous Pitch it is at preſent, among all Degrees of People, it is to be feared that ſoon there will be but little Honeſty or Virtue left.

That I don't to mean or wiſh, by any Thing I have here ſaid, that any one ſhould be deprived of any Right, for which a valuable Conſideration hath been paid, without a ſuitable Recompence, or that honeſt Labour ſhould not meet with the adequate Reward it merits, I refer my Readers to my ſaid former Preface, and to what I have before ſaid in this. I would have the Law to be, as it was intended, a Sanctuary and Aſylum to the oppreſſed and injured, and not, as it is too often, the Bane and Ruin of thoſe who are compelled to ſeek its Protection or Aid.

The Officers of the ſeveral Courts have it abundantly in their Power to promote the Expedition of Buſineſs, and the Satisfaction of thoſe who follow it, by being punctual in their Hours and Times of attending. It is quite fit it ſhould be ſo; and it is their bounden Duty, although the Legiſlature has not yet thought proper to oblige them to it. And I am convinced, there is not an honeſt, conſiderate Man among them, who has the leaſt Regard for the Public, or for Poſterity, who would not wiſh it were the Caſe this Inſtant. They well know the many Inconveniencies and Miſchiefs, which may attend its not being ſo, the thouſandth Part of which, from Friendſhip, a miſtaken Tenderneſs, or Unwillingneſs or Fear to offend, never may be brought to Light.

The publick Officers of the Courts of *Weſtminſter*, from the higheſt to the loweſt, are ſo exact and punctual

punctual in their Attendance, at their Offices and Chambers, Morning and Evening, that there are both Certainty and Pleaſure, in the tranſacting Buſineſs there, above any Thing that I have ever ſeen. When a Man undertakes a publick Office, neither his own private Affairs, nor the private Affairs of others, nor any excuſe whatſoever, can juſtify his not attending it. The true Way of enabling a Man to judge aright, and properly act in theſe Caſes (as it alſo is in all the Tranſactions of Life) to change Sides, and then to conſider, what he would wiſh to have done to himſelf.

I would alſo recommend it to them (as I would to all Men of Buſineſs whatſoever) to endeavour as much as in them lies, to be always compoſed, complacent, and in good Humour, when they are at their Buſineſs; and that, the Inſtant they find they cannot be ſo, and that Buſineſs becomes irkſome to them, they quit it; for I inſiſt on it, that if they are in a contrary State of Mind, to what I have recommended, they never can do Buſineſs; and for a Man to flatter or perſuade himſelf, (as I have in my Time often ſeen it the Caſe) that the hurry the Man has been in, from waſted or miſpent Time, or the Time he has ſpent in his Sports or Recreations, is a ſufficient Juſtification for ill Humour, or extreme Peeviſhneſs, or perhaps expecting, or rather demanding exorbitant Sums, for expediting, what he might have done with Eaſe, if he had attended, as he ſhould have done; I believe, will be allowed by every Man to be (to ſay no worſe of it) a moſt unjuſtifiable Method of acting. And indeed, the ordinary delays of Law, and the terrible Expence and Trouble that attend it, are in themſelves enough

ſor any Suitor to bear, without the Addition of Ill-treatment, or Inſolence.

I wiſh it were not ſo, but I fear, that in this Kingdom, what from the Hurry occaſioned by the miſpending of Time, (in which Caſe, the Suitor for Buſineſs, is ſure to be treated as if he were the Cauſe,) Pride, Self-conceitedneſs, Ignorance, bad Temper, or Want of good Breeding, there are much fewer than I could wiſh there were, with whom a Man may ſay there is a pleaſure in tranſacting Buſineſs.

But what is not a little Entertaining, there is ſcarce a Man of Buſineſs in this Kingdom, eſpecially in Office, who has a good Coat on his Back, who is not by ſome Means or other dubbed an Eſquire, and accordingly they enlarge their Ideas of themſelves. Had every Perſon who aſſumes this antient honorary Title, really a Right to it, there would be more Eſquires here than in any three Kingdoms in Europe. I have been told, that the King only can beſtow this Title, but it is moſt certain, that not any Officer under his Majeſty, Civil or Military, let his Station be what it will, can confer it on another, by any Office he can give him. If this be ſo, the Number of Eſquires will be wondrouſly reduced, and in the Courts confined only to the Judges, Lawyers, and ſome Patentee Officers, and the others may as well be ſtiled Barons, Viſcounts, or Earls.—It is mere Mockery.

The Sallaries of the Judges in *England*, have been of late augmented greatly; and it is moſt proper, that their Incomes ſhould be ſuch, as not only to render them Eaſy and Independant, but to enable them

them to make ſuch an Appearance in Apparel, Equipage, and Retinue, as ſhould at once Command Reſpect and Reverence to them, and the high Commiſſion they bear.

And at the ſame Time it is to be wiſhed, they did not receive Fees for any Thing they do, it has ſuch an Appearance as is really offending, and eſpecially to ſee them changing Money on the Bench, for Affidavits, *&c.* with the loweſt of the People, when perhaps ſome Matter of great Conſequence is at the ſame Inſtant debating before them, and their Attention diverted. If the Solemnity with which an Oath ought always to be adminiſtered, was adhered to as ſtrictly as it ought to be, there would be good Reaſon why the Judges ever ſhould adminiſter them; but ſurely the Officers of the Court could do the Buſineſs to the full, as well as any the Servants of the Judges. In ſhort, I would have the Sallary of a Judge to be ſuch, as would put him above all theſe, and be a Recompence to the moſt eminent Lawyer, to quit the Profeſſion for it.

As it is almoſt next to Impoſſibility, that the Sovereign Power of any Nation of univerſal Trade, Connections, Alliances, and Intereſts, can afford ſufficient Attention to the Abilities, Conduct and Character of every Man, who is to be appointed to any of the Offices of the State. It is therefore neceſſary, that ſome of the ſecondary Powers in the State (if I may ſo call them) ſhould be entruſted with the Diſpoſal of ſome of thoſe Offices, or that their Recommendation ſhould be taken for the Purpoſe. But alas! in ſuch States how has this Truſt been ſtill perverted and abuſed? Have not Offices been ſought out for Men, not Men for Offices; but

have they not been ſold, and that avowedly: How ſeldom is any Regard had to the Endowments, Abilities, or Fitneſs of the Man. And yet on this laſt entirely depends the good Government, Eaſe, and Happineſs of every Society, and of every Individual in Society. It was the conſtant Queſtion of a certain Miniſter, who is long ſince rotten in his Grave, on Application for Offices, *What Service can he do the Party?*

We read of an Emperor, who had his Horſe declared Conſul in full Senate, in deriſion of the Choices they had made to this Office. *Antiſthenes* deſired the *Athenians*, upon a certain Time, to decree, that thereafter Aſſes ſhould be called Horſes; ſome preſent replied in Banter, that cannot be. But Gentlemen (ſaid he) you can chuſe for your Generals, Men who know nothing of warlike Affairs, and whoſe Qualifications conſiſt only, in having a greater Number of Voices.

And now I am upon this Subject, there is in the State one other Office in particular, the Proſtitution of which muſt make every conſidering Man, every lover of his Country, ſhudder to think of: I mean the Office of Sheriff. If ever it ſhall happen, that Sheriffs are only choſen for the Purpoſes of Parties, there is an End of our Conſtitution and our Laws, and to all Security of Liberty, of Property of Life.

There is not an Office of higher Conſequence in the State, and yet abundantly too little conſidered. Do not they return the Members of the Legiſlature; if in this they are corrupt, is not the Conſtitution gone? and could Liberty ſurvive it? Do not they return Juries, to try our Lives and Properties? If in this they are Corrupt, would not this moſt invaluable

valuable Bleſſing, which no Nation but ourſelves enjoys, be as if we had it not? And laſtly, is it not by them our Laws are to be finally executed; and if herein they ſhould be governed by Favour, Partiality, or Prejudice, (which ever muſt be the Caſe, if either Faction or Party, ſhould at any Time have the appointing of them) would our Laws be any other then, or more, than a mere dead Letter, to the entire Deſtruction of all Credit, Truſt, Securities, and Commerce?

I have mentioned how eſſentially neceſſary it is that the Gentlemen of the Bar ſhould have a thorough previous Knowledge of the Civil, Canon, and Feudal Laws, as the Springs and Fountains of all the Laws, in which they are afterwards to engage as Advocates, as they are alſo in moſt Caſes of the Practice and Proceedings of our Courts of Equity. Now for this laſt Reaſon, I would alſo recommend a tolerable Knowledge of theſe Laws to the Members of the Profeſſion I belong to: Not but that I deſpair of this being ever brought to paſs, until ſome Regulations ſhall be firſt made in it. Whoever attends the Courts muſt ſee, that ſeveral of them can ſcarce read a ſingle Sentence, ſo as to be underſtood, and yet ſome of them, who have little or no Buſineſs of their own, are eternally preſſing forward to be employed in this Way for others, crouding the Courts, to the abſolute impediment and Obſtruction of thoſe, who have really Buſineſs to tranſact there. It is quite otherwiſe in the Courts at *Weſtminſter*, the Agents only who are concerned in the Cauſe, or Motion that is on, appear at the Table. Then as to their Writings, I have heard ſeveral Gentlemen of the Bar declare, that many Caſes they receive from Attornies,

are ſcarce Intelligible; and how can it be otherwiſe, where ſo little Education is thought neceſſary: But why ſhould I thus waſte in vain, the Time of myſelf and my Readers? for all theſe Things will never be otherwiſe, until the Love of Virtue, and of publick Good, ſhall get the better of the confined, ſordid, mean Views, of ſelfiſh Love and private Intereſt, and the Love of Eaſe and Pleaſure; a Change devoutly to be wiſhed.

I would alſo for the Reaſons I have before mentioned, recommend the Study of theſe Laws to every Man, who from his Rank or Fortune, may be one Day called on, to be one of the Legiſlature, or to fill the important Offices of a Sheriff of a County, or a Juſtice of the Peace; but far be it from me, to recommend the Study of our Laws, in the Manner a certain Profeſſor has done of late, to all Degrees of People, even Phyſicians. A Knowledge of the General Laws of Nations, and of the fundamental Laws and Conſtitution of our own Country is as laudable, as it is uſeful; but to be ſkilled in the Profeſſion Part of our Laws (if I ſo may call it) is only fit for thoſe who are to follow it; beſides, the longeſt Life is ſcarce enough to acquire a perfect Knowledge of it, and a ſlight, or ſuperficial one ſeldom fails to prove a Scourge, not only to the Poſſeſſor, but to all who have to do with him, during the Courſe of his Life.

I find that public Offices are as far from being erected now as ever. Will nothing but ſome fatal Accident, ſome dire Calamity, the Miſchiefs of which a Century may not ſurmount, ſpur on to this loud-called-for Work? Has there not been a very recent Warning given, when the *Exchequer-Office*,

Office, and all its Records were near being conſumed by the Flames of St. *Werburgh*'s Church? If we can be ſure of any Thing in Life, it is that the Perſons to whom the Conduct of this momentous Buſineſs is intruſted will never ſuffer any private Job to be made of it, (too uſual in ſuch Caſes in this Kingdom,) or give the leaſt Encouragement to any improper Application (let them who apply be who they will) for the uſing of this or that Ground, or the employing of this, or that Workman, for the Advantage of the Owner of the Ground only, or the Emolument of any Builder, and the Public not conſidered, however, they may be at a Loſs for ſometime how to act, if ſuch Things ſhould be, and the Buſineſs not proceeded on. Some have thought, that if there is to be a new Bridge and the preſent Cuſtom-Houſe to be removed, it and the Ground about it would be extremely fit for public Offices, and the Four-Courts.

In my former Preface I offered ſome Hints, as to the Situation, and the Manner of building theſe Offices, I will add a few more, and they are, firſt, that they be either built, or at leaſt lined with well burnt Bricks; and then, that great Care be taken, that the Bricks be not made of Clay that lyes near the Sea, and that no Sea Sand be uſed in the Lime, for if either of theſe ſhould be the Caſe, every Letter of the Writing would be quickly diſcharged.

If any Thing I have mentioned in this, or my former Preface, ſhall ſome Day ſtir up any of the public-ſpirited, or noble Minds to take any of the univerſally allowed Grievances, I have therein ſpecified, into their mature Conſideration, and have them

them rectified, as for the Benefit of Society they ought to be, I ſhall then think all the Time and Labour I have ſpent, and all the Expence I have been at in theſe ſeveral Productions (by the tranſcribing and publiſhing, of which I am above three hundred Pounds out of Pocket, beſide my Time) well beſtowed, and the ſecret Satisfaction it will give me to have ſo far contributed, ſhall be my ſufficient Reward.

In my *Practice of the Law-Side of the Exchequer*, I have ſet down the Dates of all the Rules; but they were made by the Court, and entered in the Rule Books though never collected until I collected them; whereas, the Rules on the *Equity Side* are moſt of them, nay except a very few, taken from the Ordinances which were made by Lord Chancellor *Bacon*, for the better and more regular Adminiſtration of Juſtice, in the *Chancery* of *England*; and from a long Uſage, Time immemorial, are become the ſtanding Rules, of the *Equity-Side* of the Court of *Exchequer* in *Ireland*, and are in Manuſcript in the Hands of Numbers.

To conclude, beſides the reading I have already ventured to recommend to the ſeveral Members of the Profeſſion of the Law, there is *Domat*'s *Civil Law*, in the 2d Vol. of which *Tit.* 3. pa. 588 to 629, they will find the Duty of every Branch of it, from the Judge to the Jailer, moſt learnedly diſcuſſed.

I had branched out much more into the Civil, Canon and Feudal Laws than is publiſhed in this Work, but then it would have made three Volumes; and the Loſs I had in publiſhing the *Pleas-Side*,

Side, and the ſmall Proſpect I had from thence of Encouragement in this, (and in which I have not been in any Sort diſappointed) obliged me to leave out Abundance of that Learning, and to reduce the Whole to its preſent Appearance.

I had alſo collected for this Introduction a ſhort *Treatiſe of Equity*, but after I had finiſhed it, I met with a Treatiſe on this Subject, wrote (it is ſaid) by Mr. *Francis*, as alſo another Work, very lately publiſhed, intitled *The Principles of Equity*, both of which bear ſuch Repute, as would have made it appear moſt preſumptuous in me, to have publiſhed the ſmall Performance I had ſo attempted.

In this Book, intitled *The Principles of Equity*, the learned Author thus explains the Deſign and Buſineſs of Equity. " Equity, he obſerves, ſupplies " the Defects of Common Law, by taking under " Conſideration every material Circumſtance, in " Order that Juſtice may be diſtributed in the moſt " perfect Manner. It ſometimes ſupplies a Defect " in *Words*, where *Will* is evidently more exten- " ſive, and ſometimes ſupplies a Defect even in " *Will*, according to what probably would have " been the *Will* of the Parties had they foreſeen " the Event. "

The Writer, in the next Place, inſiſts on the Neceſſity that a Court of Equity ſhould be governed by General Rules, " Though a particular Caſe, " (ſays he,) may require the Interpoſition of a " Court of Equity, to correct a Wrong, or ſupply a " Defect, yet the Judge ought not to interpoſe, " unleſs he can found his Decree upon ſome *Rule*, " that is equally applicable to all Caſes of the Kind.

" We

" We muſt ſtop ſhort ſomewhere; for Courts can-
" not be eſtabliſhed without End, to be Checks
" upon one another: and hence it is, that, in the
" Nature of Things, there cannot be any other
" Check upon a Court of Equity, but *general*
" *Rules.* "

For more of this Matter, ſee the aforeſaid Treatiſe of Equity, *and the* Principles of Equity. *See alſo the* Introduction *to* Harriſon's Chancery Practice.

P. S. I have been lately informed, that ſome Gentlemen of my Profeſſion have been induſtrious to report, that there are ſome Errors in my *Law Practice.* I do not, in the leaſt, doubt but there may; and if any of them will, by Way of ſmall Supplement, point out ſuch Errors as they have found therein, or may find in this preſent Work, with any Additions or Improvements to the whole; ſo far from offending me, it will oblige me greatly; for I meaned it more for Benefit to the Public than for Honour to myſelf: And it was impoſſible for me, or any Man, to be certain on a Subject, that it is well known is varying and fluctuating every Day, and that there is not any Thing at preſent more uncertain; but, as I have before ſaid, perhaps theſe Works of mine may lead at length to the ſettling and eſtabliſhing of ſuch a Certainty in the Rules and Practice of this Court, as may hereafter be relied on, and has been ſo wiſhed for theſe five and twenty Years and upwards, to my Knowledge.

But

But if theſe Gentlemen ſhall decline what I have here called upon them to do, I ſhall conclude, that their Reports were rather the Effect of Envy, than of any wiſhing well to the Public.

As for the Errors of the Preſs, which are in the *Practice of the Law Side of the Court*, (and which are indeed too many) they were owing in a great Meaſure to my being in *England* upon Buſineſs, at the Time a great Part of the Work was printing, and to my conſtant Hurry of Buſineſs: But I am marking them out, and the Printer has promiſed me to publiſh a Page of *Errata*, which as ſoon as they are done, ſhall be given *gratis* to every one who purchaſed the Work.

The Collections which I have made relating to the *Revenue* Side of this Court, and to the *Exchequer* and *Revenue* of *Ireland* at large, as mentioned in my ſaid Preface to the Practice of the Law Side of the Court, (and which now only wait to be reviſed) will make two middling Folio Volumes. and cannot be ſold under two Guineas: But it is hoped, it is a Work which will be uſeful to all thoſe who are, or may be Members of the Legiſlature, to Merchants and others, as well as to the Profeſſors of the Law, and Practitioners of the Court. It has been ſeen by ſome Gentlemen, who well underſtand the ſeveral Matters which are there treated of, and they have told me, the publiſhing of it would be of Uſe.

THE

THE

SUBSCRIBERS NAMES.

A.

WILLIAM Auſten, Eſq; one of the Maſters of the High Court of Chancery
Mr. Henry Humphry Adams
Hull Atfield, Eſq;
Mr. John Arnold
John Armſtrong, Eſq;
Richard Athe, Eſq;
Francis Andrews, L. L. D. Provoſt of T. C. D.

B.

The Right Hon. Lord Baron Bowes, Lord High Chancellor of *Ireland*
Mr. Richard Bartlett
Sir Simon Bradſtreet, Bart.
Mr. William Bolton
John Bourke, Eſq; one of His Majeſty's Commiſſioners
Mr. Theophilus Blakely
James Brown, Eſq;
John Bennet, Eſq;
John Bloſſet, Eſq;
Mr. Richard Bibby
Mr. John Byrne
Mr. William Barker
Mr. John Boland
Mr. Joſeph Bayly
Mr. Henry Broomer

Mr. Edward Butler
Mr. Patrick Brady
Mr. William Bowen
Mr. Thomas Blakeny
Mr. David Buttle
Ignatius Blake, Eſq;
Mr. George Byrne

C.

The Right Honourable Lord Chief Juſtice Caulfeild
Mr. Thomas Cade
Mr. Campbell Craig
Richard Clarke, L. U. D.
The Right Hon. the Earl of Clanbrazil, Chief Remembrancer of his Majeſty's Court of Exchequer
Mr. Abel Carter
Thomas Coſtello, Eſq;
Alexander Carrol, Eſq;
Mr. James Crowe
Thomas Croker, Eſq;
Mr. Thomas Church
Mr. William Crookſhanks
Mr. Patrick Colclough
Mr. John Carrol
Mr. William Crowe
William Connor, Eſq;
Counſellor Coſteilo
Conſtantine Cullen, Deputy Regiſter of the High Court of Chancery
Mr. Robert Carſon
Mr. Theodore Cooke
Mr. William Coultherſt
Mr. Henry Clark
William Chamberlaine, Eſq;
Mr. Edward Croaſdale
Mr. Jonathan Calbeck

D.

D.

Mr. Baron Dawſon
John Dennis, Eſq;
Mr. Thomas Dalton
James Dennis, Eſq;
Jonathan Darby, Eſq;
Malachi Daly, Eſq;
William Deane, Eſq;
Mr. James Dobbin
Edward Donovan, Eſq;
Mr. Charles Demſey
William Dunkin, Eſq;

E.

Mr. John Evans
Mr. Chriſtopher Elliſton

F.

The Right Hon. Warden Flood, Eſq;
Lord Chief Juſtice of the K. Bench
Mr. Richard Fetherſton
Thomas Fitzgerald, Eſq;
Mr. Charles Fleetwood
Anthony Forſter, Eſq;
Mr. William Fitzgerald
Mr. Thomas Fitzgerald
John Fitzgibbon, Eſq;
Robert Fitzgerald, Eſq;

G.

James Grattan, Eſq; Recorder of the
City of *Dublin*
John Gore, Eſq;

Joſeph Green, Eſq;
Mr. Joſeph Griffith
Mr. John Gardiner
Richard Gorges, Eſq;
Thomas Goddard, Eſq;

H.

John Heley Hutchinſon, Eſq;
Mr. William Hickie
Mr. Edward Herbert
Mr. Robert Hamilton
William Henn, Eſq;
Mr. Francis Hopkins
Mr. Jack Hatton
Mr. James Hornage,
Hugh Howard
John Hatch, Eſq;
Francis Anneſley Hughes, Eſq;
Mr. Richard Holmes
Howard, Eſq;
Joſeph Hoare, Eſq;
Mr. Joſeph Hickey
Edward Herbert, Eſq;
Mr. John Humphrys
Alexander Hutchinſon, Eſq;
Mr. Robert Hamilton
Mr. Daniel Hernon
Mr. John Huleatt
Mr. Daniel Hogan

J.

Mr. William Jackſon
Arthur Johnſton, Eſq;
Mr. John Jones
Mr. Benjamin Johnſon
Richard Jackſon, Eſq;

Mr.

Mr. William Juſtus
Mr. Samuel Jones

K.

Lord Biſhop of Kildare
Mr. Redmond Kane
Peter Kilkenny, Eſq;
Mr. Thomas Keating
Mr. Samuel Katherens

L.

Mr. William Lane
Godfrey Lill, Eſq;
John Leigh, Eſq;
Samuel Lowe, Eſq;
Thomas Lehunt, Eſq;
Mr. William Lyſter
Mr. Paul Limrick
Mr. Thomas Lee

M.

Mr. Juſtice Marſhal
Right Hon. Anthony Malone, Eſq;
Elland Moſſom, Eſq; Recorder of Kilkenny
Mr. Daniel Mc Nemara
Mr. Baron Mountney
Richard Morgan, Eſq;
Redmond Morres, Eſq;
Edmond Malone, Eſq; 2d Serjeant
Mr. Lewis Moore
James Mc Manus, Eſq;
Mr. Richard Malone
Mr. William Magrath
Mr. Patrick Macdonagh

Mr. Alexander Mc Aulay
Mr. James Miller
George Meares, Eſq;
Charles Meares, Eſq;
Robert Meares, Eſq;
Honourable Barry Maxwell, Eſq;
John Morriſon, Eſq;
Daniel Maguſty, Eſq;
Mr. Francis Meade
Mr. James Meade

N.

Giffard Neſbit, Eſq;
Mr. Joſhua Niſbitt
Mr. William Noble
Mr. Nichard Nelſon

O.

Lucius O Brien, Eſq;
Mr. James O Hara

P.

Marcus Patterſon, Eſq; 3d Serjeant
Edmond Sexton Perry, Eſq;
Mr. Thomas Prendergaſt
Shimble Philips, Eſq;
Mr. Swift Perry

R.

Mr. Juſtice Robinſon
Stephen Ratcliff, Eſq;
Mr. Francis Ryan
Mr. Hugh Reynolds
Mr. Robert Reynell

John

John Reilly, Eſq;
George Roth, Eſq;
Mr, Roger Rourke
Matthew Ryan, Eſq;

S.

Mr. Juſtice Scot
Mr. Hamilton Stuart
William Swift, Eſq;
Mr. George Smyth
Luke Sterling, Eſq;
Marlborough Sterling, Eſq;
James Shiel, Eſq;
Mr. Sterling
Mr. Henry Sandes
William Stewart, Eſq;
John Smyth, Eſq;
Mr. John Stephens
Mr. Matthew Swiney
Michaell Swift, Eſq;
Mr. Edward Scriven
Mr. James Stanly
Mr. Edward Sterling

T.

Philip Tiſdall, Eſq; Attorney General
George Tyrrell, Eſq;
P. H. Talbot. Eſq;
Thomas Tiſdall, Eſq;
John Tunnadine, Eſq;
John Taaffe, Eſq;
Mr. John Tennall
Mr. John Thewles
Wentworth Thewles, Eſq;
Mr. Arthur Thomes
Mr. Robert Tench
Mr. Treſham

V.

Mr. Thomas Vener
George Vernon, Eſq;
Thomas Vandeleur, Eſq;
Mr. Boyle Vandeleur

W.

The Right Hon. Lord Chief Baron Willes.
Adam Williams, Eſq;
Mark Whyte, Eſq;
Theobald Wolfe, Eſq;
Mr. Henry White
Mr. Clement Winnett
William Whittingham, Eſq;
Mr. Thomas Wills
Mr. Stephen Wybrents
James Wall, Eſq;
Richard Wilſon, Eſq;
Mr. Richard Workman

Y.

The Right Honourable Lord Chief Juſtice Yorke
Mr. John Young

A TREA-

A TREATISE ON THE Rules *and* Practice OF THE EQUITY SIDE OF THE EXCHEQUER in *IRELAND*, &c.

Abatement and *Revivor*.

What ſhall abate the Suit and E Contra, and the Proceedings on Bills of Revivor.

IN the Civil and Canon Laws if any of the Parties died pending the Suit, there iſſued a *Citatio ad reaſſumendam Cauſam*, but then it muſt have appeared to the Judge by proof that the Party was dead, for it was not enough for the Judge to know it in his

Bill of Revivor analogous to the Citation *ad reaſſumendam Cauſam* in the Civil and Canon Laws.

private Capacity, it was neceſſary that it ſhould be proved to him judicially; but this Proceſs lay only againſt the Heir of the Defendant, and for the Heir of the Plaintiff, and ſo from Heir to Heir *Uſque ad Concluſionem Cauſæ*, and even after Sentence, to have Execution of the Sentence pronounced. *Gail*, 194. 5.

Who may bring the Bill of Revivor.

Analogous to this in the Court of *Chancery* is the Bill of Revivor, and the *Subpœna ad Revivendum* is the ſame as the *Citatio ad Reaſſumendam Cauſam*, and the *Subpœna* is only for the Heir, or Executor, or Adminiſtrator who come in privity, (as they call it) that is, in immediate Repreſentation to the Party litigant deceaſed, for a Deviſee or Aſſignee of any Plaintiff cannot have a *Subpœna ad Revivendum* after the deceaſe of ſuch Plaintiff, and this is for two Reaſons:

Why a Deviſee or Aſſignee may not bring this Bill.

Firſt, becauſe they looked upon a Suit to be but a *Choſe in Action*, which was not aſſignable over, for fear of Maintenance; but this Reaſon has been ſince obſolete in the Court of *Chancery*, where they allow the Aſſignment of ſuch Intereſt.

Ibidem.

But the ſecond and better Reaſon is, becauſe where the Party deviſes or aſſigns his Intereſt and dies, if the Deviſee or Aſſignee were to bring his Bill of Revivor againſt the Defendant, the Heir or Executor would be pretermitted, who might have

have a right to conteſt ſuch Diſpoſition, and therefore he muſt bring his original Bill, and make the Heir or Executor a Party. 1 *Ch. Ca.* 122. 174.

If the Plaintiff dies pending a Suit, it is abated, and his Executor or Adminiſtrator muſt revive the Cauſe before he can proceed thereon. In what Caſe a Bill of Revivor is neceſſary.

So if a Defendant dies, the Suit is abated, and if it is a perſonal Demand againſt him, the Bill muſt be to revive and anſwer, and the *Subpœna* to the ſame purpoſe. Ibidem.

But with reſpect to an Abatement by the death of Parties, it is an univerſal Rule, that it muſt be by the Death of ſuch, as were ſo far materially concerned in Intereſt, as to make it neceſſary to have their Repreſentatives before the Court, before the Cauſe can be finally determined; ſo that where ever a Death happens, and yet the right ſurvives, and the Cauſe is in the ſame Plight and Condition after the Demiſe, as it was before, there is no need of the Revivor, becauſe no other Perſon is to be ſent for, nor any other Perſon to be made Party to the Complaint. Ibidem.

But where the Right does not ſurvive, or there is any Alteration therein by the Death of any of the Parties, there, the Cauſe muſt be revived, againſt the Per- Ibidem.

ſon or Perſons, who in Right of Repreſentation ought to be Parties, or the Cauſe cannot be heard.

The Proceedings thereon.

And when it is neceſſary to revive, a Bill of Revivor may be exhibited, and *Subpœna* to revive and anſwer, or to revive only, (as the Caſe requires) may be of courſe iſſued by a Perſon intitled to revive, and if the Bill be to revive only, then on the Defendant's appearance, or after the Defendant's Time for appearing is out, and an Attachment iſſued for want of an Appearance, all the Proceedings in the former Suit, ſhall on ; an Attorney's Motion ſtand revived and the Cauſe may be proceeded on, and the Rules for anſwering this Bill, where an Anſwer is required, are the ſame, as upon an original Bill. See *Title Anſwer.*

The Proceedings in reviving the Cauſe, where the Bill is to revive only, and where it is to anſwer and revive.

In the Caſe of the Attorney General againſt *Carden*, *Gilborne* and others in this Court, *Trinity* Term 1759; on an Information for a forfeited Eſtate in the nature of an *Engliſh* Bill, one of the Defendants againſt whom the Information only prayed an Account of the Profits of an Eſtate during the time he received them as a Sequeſtrator appointed by the Court, having died after he had anſwered, and the Cauſe had been ſet down to be heard, and it being thought neceſſary to bring his Repreſentative before the Court meerly as a party for Conformity, an Information

formation was accordingly filed, but no Anſwer was prayed by it, and the *Subpæna* that iſſued thereon was to revive, only the Defendant appeared in the preceding Term within the four Days allowed for that Purpoſe, and immediately on the Appearance a Motion was made, (as uſual) that the Cauſe ſhould ſtand revived, but the Court (through the miſtake of the Officer in his Information of the Practice) thought the Application too early, and that although the Information prayed no Anſwer, yet that the Motion that the Cauſe ſhould ſtand revived ſhould not be made until after four Days after the Appearance to the *Subpæna* to revive; and thereupon, within theſe four Days in this Term the Defendant's Attorney moved a Rule of Courſe for Time, until the firſt Day of the enſuing Term to anſwer, but on ſolemn Debate this Rule was ſet aſide, and the Court reſolved the Practice to be thus, that where the Bill is meerly to revive, and does not require an Anſwer, the Defendant has but four Days after Service with Proceſs to revive, to ſhew Cauſe, either by Anſwer, or Plea, why the Cauſe ſhould not be revived, and that upon an Appearance being entered, or Attachment for want of an Appearance, the Plaintiff's Attorney may move the Court of Courſe, that the Cauſe may ſtand revived. But if the Defendant would have further time to ſhew Cauſe againſt the Revivor, he is to make

a ſpecial Application by Council within the four Days, and to give the uſual Notice of the Motion.

The King's Buſineſs in this Court to be preferred in all Caſes.

And in the ſame Caſe, a ſpecial Application was made, as the King's Revenue was concerned, that the Cauſe might be forwarded in the Paper and placed above others that had been ſet down before it, and accordingly the Court ordered that it ſhould be the firſt in the Paper for the firſt Hearing-day in the enſuing Term: and were unanimouſly of Opinion that the King has this Right in the Exchequer, being the Court which was inſtituted for the Management of his Revenue only, and that it is only under the Surmiſe *that his Revenue is concerned*, that any Perſon can ſue in the *Exchequer*; and therefore the Attorney General in any Caſe, where the King is actually concerned, may ſtop all other Buſineſs not only himſelf to move, but alſo to call on a Motion where he is to defend it.

No Anſwer commonly neceſſary to this Bill but the Defendant may by Anſwer or Plea ſhew Cauſe againſt the Revivor.

There is no Anſwer generally neceſſary to a Bill of Revivor, the Cauſe will ſtand revived without any Anſwer, for the Citation brings the Repreſentative into Court, and being there, upon Motion as aforeſaid, the Cauſe ſhall ſtand revived againſt him, becauſe when the Heir does not ſhew any thing to the contrary, the Appearance of the Anceſtor by the Attorney continues to him as if there had been no Demiſe; but the Defendant

ſendant may for his Benefit, put in any Plea, or Anſwer, and ſhew that he is not Heir, or has not the like Intereſt, or that there is not the ſame Cauſe of Complaint againſt him.

The Bill of Revivor muſt purſue the firſt Bill, becauſe otherwiſe it is not a Revivor of the ſame Suit, and it muſt recite the Subſtance, or material Parts of the Pleadings ſhortly, and not recite them in *hæc verba*, or it may be referred for Prolixity, and is to ſet forth the Abatement, with a Prayer to revive, and of a *Subpæna* againſt the Defendant, or the Party againſt whom the Revivor is ſought, to ſhow Cauſe why the Cauſe ſhould not ſtand revived, and this Bill is to be engroſſed, ſigned and filed in the ſame Manner with the original Bill. *See Title Bills.*

The Bill of Revivor to purſue the firſt Bill and what it is to contain.

In caſe there be any material Difference between this Bill, and the former, the Defendant may demur; and upon ſuch Demurrer the Bill of Revivor ſhall be diſmiſſed, becauſe the Prayer of the Bill is, that the Pleadings may ſtand in the ſame Plight and Condition as at the Time of Abatement, therefore Matter coming to the Knowledge of the Party reviving ſince the Abatement cannot be inſerted in the Bill of Revivor, for this would make it partly an original Bill and partly a Bill of Revivor.

Or the Defendant may demur.

Unleſs Matter ariſeth by the Abatement, as Aſſets in the Hands of an Heir or Executor.

But if any new Matter ariſeth by the Abatement, which makes it neceſſary to add a new Charge, That may be inſerted in the Bill of Revivor, as the Plaintiff may pray a Diſcovery of Aſſets in the Hands of an Heir or Executor, and a *Subpœna* to revive and anſwer, in which Caſe the Defendant muſt anſwer thereto, and the Court will then on an Attorney's Motion, order the Cauſe to ſtand revived.

Admiſſion of Aſſets by the Defendant, in what Caſes not ſufficient, but the Aſſets to be ſet forth.

Where a Bill prays either an Admiſſion, or a Diſcovery of Aſſets from the legal Repreſentative of the dead Party, it is generally held, That if the Executor or Adminiſtrator of the deceaſed Defendant admits Aſſets ſufficient to anſwer the Demand in Queſtion, this is good, but in ſome Caſes the Court will not allow it to be ſo, though this rarely happens: Indeed, if the Heir or Executor ſets forth the yearly Value of the real Eſtate Subject to Debts, this is good becauſe the Eſtate is a permanent Stake; but after an Admiſſion of perſonal Aſſets it may be in the Power of the Party either to waſte or run away with them, for in this Caſe nothing but the Perſon of the Party is at Stake: And there may be Caſes where two Executors are appointed, one refuſes to act, and the other who is inſolvent poſſeſſes the whole Aſſets, and therefore when any of theſe Caſes appear to the Court, or where the Party who poſſeſſes the Aſ-

ſets

ſets is in dubious Circumſtances, it is no new Thing for the Court to oblige him to ſet forth the very Aſſets in Specie, to the End, the Plaintiff may purſue and follow them, and know where they are, and how to come by them, but this rarely happens, and is only done in extraordinary Caſes.

But where Strangers or even Debtors to the Eſtate are made Parties to the Bill of Revivor, and a Diſcovery of Aſſets ſought thereby as againſt them, they ſhall never diſcover them to any one, but to the Executor, or Adminiſtrator of the Party, who alone can recover them; eſpecially where the Executor or Adminiſtrator by his Anſwer hath admitted Aſſets; for, a Stranger, where there is no Privity of Eſtate between him and the Teſtator ſhall never ſue Strangers who are no ways accountable to him.

Strangers or even Debtors to the Eſtate not obliged to diſcover Aſſets, but to the Executor or Adminiſtrator, and eſpecially if the Executor or Adminiſtrator hath admitted Aſſets.

Indeed if the Executor or Adminiſtrator appears plainly to the Court to be inſolvent, Caſes may be found where the Court will lay their Hands on the Aſſets; but this ſcarce ever happens, nor can the Court (ſtrictly ſpeaking) oblige any Executor to give Security to anſwer the Debt, it was the Teſtator that made him Executor, and appointed him to ſtand in his Place, and if he waſtes, or runs away with the Aſſets, there is no helping it.

Though the Executor be inſolvent, yet the Court ſeldom lay their Hands on the Aſſets, or oblige the Executor to give Security.

If

If an Executor or Adminiſtrator admits Aſſets by his Anſwer, and the Plaintiff revives the Cauſe, he cannot afterwards refer the Anſwer for Inſufficiency.

If an Executor or Adminiſtrator upon a Bill of Revivor does by his Anſwer admit Aſſets, and the Plaintiff upon coming in of the Anſwer, revives his Suit, and proceeds in the original Cauſe upon the Revivor, it is ſaid he ſhall never afterwards refer the Anſwer for Inſufficiency, for this he ought to have done at firſt, and before he proceeded to revive the original Cauſe, his doing whereof is an Admiſſion that the Anſwer was full and perfect, or otherwiſe he might have excepted thereto, and had the Opinion of the Court thereon.

If a Bill be brought againſt a Man and his Wife, where the Matter wholly concerns the Wife, and they anſwer either jointly or ſeverally and the Huſband dies, a Bill of Revivor muſt be brought againſt the Woman.

If a Bill be brought againſt a Man and his Wife, where the Matter wholly concerns the Wife, they both anſwer, and the Huſband dies; here, a Bill of Revivor muſt be brought againſt the Woman, for ſhe ſhall not be obliged to abide by that Anſwer which ſhe together with her Huſband, or ſeparately as his Wife, hath formerly made, becauſe ſhe was then under Coverture, and conſequently under the Awe and Influence of her Huſband; but if the Matter in Queſtion remain in *Statu quo*, it is at her Election whether ſhe will abide by that Anſwer, or not.

Baron and Feme Plaintiffs, the Baron dies, the Feme has it at her Election

But if a Man and his Wife be Plaintiffs, and the Defendant anſwers, and the Huſband dies, the Wife has it in Election,

lection, whether ſhe will exhibit a new Bill, or proceed on the old one by Revivor; for ſhe may change her Cauſe of Complaint, or not, at Election, becauſe the former Suit was commenced when ſhe was under the Dominion of her Huſband.

whether to revive or exhibit a new Bill,

Where a Feme Sole anſwers, and afterwards *pedente Lite* marries, the Plaintiff may proceed againſt her without reviving, for it cauſes no Abatement, and the Huſband ſhall be bound by the Anſwer ſhe made whilſt ſole; for ſhe ſhall not take Advantage of her own Act. And in this Caſe, there is no Occaſion, nor is it practiſed, for the Plaintiff to obtain an Order to make the Huſband a Party to the Suit, as he is not bound to know of the Marriage; but the Court, upon Motion of the Defendant's Attorney, will order, that the future Proceedings ſhall be in the Name of the Huſband and Wife. *See* 2 *Williams*, 372.

If a Feme Sole anſwers and afterwards marries, the Plaintiff may proceed without reviving.

But if a Feme Plaintiff marries, by her own Act ſhe abates the Suit, of which the Defendant may take Advantage, and ſhe and her Huſband muſt therefore exhibit a Bill of Revivor, and ſerve a *Subpœna* to revive, and the Time for anſwering being out, it is a Motion (as aforeſaid) of Courſe to revive Proceedings.

But if a Feme Plaintiff marries, ſhe and her Huſband muſt revive.

But

But if the Defendant anſwers after the Abatement, and before Revivor, if he knew of the Marriage, he ſhall not take Advantage of the Proceeding without reviving.

But it is ſaid, that if a Feme Sole exhibits her Bill, and marries, and the Defendant anſwers, and after would take Advantage of the Plaintiff's Proceedings without Revivor, the Defendant ſhall be examined upon Interrogatories, whether before his Anſwer he knew of the Plaintiff's Marriage? And if ſo, the Plaintiff ſhall proceed without Revivor, for there was no need to cite the Defendant to appear, where, after Knowledge of the Abatement he appears and anſwers gratis without it, and he waives the Benefit of the Citation by the Anſwer.

Where there are ſeveral Plaintiffs and one dies, and the Right ſurvives, there is no Occaſion to revive, but a Motion to be made to proceed in the ſurviving Plaintiff's Name.

Where there are ſeveral Plaintiffs as Joint-tenants, Executors, Co-obligators, *&c.* the Suit doth not abate upon the Death of any of them, but in this Caſe, there muſt be a Motion for Liberty to proceed in the ſurviving Plaintiff's Name. 3 *Ch. Rep.* 66. *Sed quær.* as to Tenants in common for a Right deſcends to their Repreſentatives.

And where there are ſeveral Defendants, and one dies, and that it is not neceſſary to revive, a Motion may be made to proceed againſt the Survivor.

And where there are ſeveral Defendants, and one of them dies, and that it be not neceſſary to revive, a Motion is to be made for Liberty to proceed againſt the ſurviving Defendants.

And when an Infant comes of Age, where there has been an Adminiſtrater

Adminiſtrators *duranti minori Ætate* exhibit a Bill, in the *Interim* or *pendente Lite*, the Infant comes of Age, there needs

needs no Bill of Revivor becauſe it is a Continuation of the ſame Repreſentation, *See Bac. Abr. Equ. Ca.* 2. And when the Adminiſtration is granted to the Infant, he may move by his Attorney for Liberty to proceed in his own Name, and the Court will grant it.

durante minori ætate, there is no Occaſion to revive.

Where the Demand againſt the Defendant is perſonal, and he dies, the Bill muſt be to revive and anſwer againſt the Repreſentative of ſuch Defendant, and the *Subpœna* accordingly. 1. *Chan. Pract.* 105.

If the Demand againſt the Defendant be perſonal, and he dies, the Bill againſt his Repreſentative muſt be to revive and anſwer.

If the Huſband and Wife ſue in the Wife's Right, and pending the Suit the Huſband dies, yet the Wife may proceed. 3 *Chan. Rep.* 40.

Baron and Feme ſue in the Wife's Right, he dies, ſhe may proceed.

So if a Promiſe be made to the Huſband and Wife during Coverture, and they bring a Bill for Performance, and pending the Suit the Wife dies, yet this ſhall be no Abatement, for the whole Intereſt ſurvived to the Huſband. *Cary*, 88.

If they ſue for what they have a joint Right to, and ſhe dies, it is no Abatement, or where the whole Intereſt is in the Huſband.

So, if a Bill be exhibited for a Legacy againſt Baron and Feme, who is Executrix of the Teſtator, and pending the Suit the Huſband dies, this ſhall be no Abatement of the Proceedings; but had it been concerning the Wife's Inheritance, it might be otherwiſe. 2 *Vern.* 249.

Feme Executrix ſued for a Legacy, and the Baron dies, no Abatement.

If

After an Outlawry reverſed, Plaintiff muſt revive.

If a Plea of Outlawry ſtands allowed, whereby the Suit is put *ſine die*, and after the Outlawry be reverſed, the Plaintiff muſt bring his Bill of Revivor, becauſe the Suit being abated, the Defendant has no Day in Court, and therefore muſt be brought in by a new Citation.

The Plaintiff's Death after a Bill of Interpleader and a Trial at Law directed to ſettle the Right, abates not the Cauſe.

Upon a Motion it was declared by the Court, that a Cauſe having been heard upon a Bill of Interpleader, and a Trial at Law directed to ſettle the Right between the Defendants, there is an End to the Suit as to the Plaintiff, ſo that if he afterwards dies, the Cauſe ſhall ſtill proceed, and there needs no Revivor, each Defendant being in the Nature of a Plaintiff. 1 *Vern.* 352.

Decree againſt *Ceſtuique Truſt*, and Truſtees to convey, *Ceſtui que Truſt* dies, the Truſtees ſhall convey.

Though by the Death of the *ceſtuique Truſt* the Suit abates as to him, yet if there be a Decree againſt him and his Truſtees to convey, *&c.* the Truſtees are obliged to convey; for the Death of either Party makes an Abatement only *quoad* himſelf. 1 *Chan. Pract.* 107.

Court will order Money out of Court to a Perſon intitled by Decree, notwithſtanding the Death of ſome of the Parties.

The Court will order Money out of Court to a Perſon intitled by a Decree, notwithſtanding the Death of ſome of the Parties. *Michaelmas* 1727, between *Finch* and Lord *Winchelſea*. 1 *Chan. Pract. 3d Edit.* 284.

If

If a Cauſe has ſlept twelve Months in Court, there ſhall be no Proceedings had upon it, without firſt ſerving a *Subpœna ad faciendum Attornatum.* For the Proceedings on this Writ, *See Vol.* 2. *Title Proceſs.*

Where a Cauſe has ſlept 12 Months the Defendant muſt again be brought into Court by *Subpœna ad faciendum Attornatum.*

Where there are ſeveral Parties to a Suit, and ſome of them die pending the Suit, by which it abates, the Suit muſt be revived againſt their Repreſentatives; but none of the other Defendants, to whom the Abatement does not relate are to be Parties; and great Care muſt be taken in framing the Bill of Revivor accordingly, and not to pray Proceſs againſt any but thoſe againſt whom the Cauſe is to be revived; and if an Anſwer be required, to pray a *Subpœna* to revive and anſwer, if no Anſwer be required, then only to pray a *Subpœna* to revive.

The Method of reviving a Suit where there are ſeveral Parties in the Cauſe, and it only abates as to ſome of them.

Who may revive the Suit, and againſt whom, and in what Caſes.

A BILL of Revivor can only be brought by the Heir as to the Reality, and by an Executor or Adminiſtrator as to the Perſonalty. 1 *Har. Chan. Pract.* 287. *3d Edit.*

The Heir can only revive as to the Reality, the Executor or Adminiſtrator as to the Perſonalty.

If

An Aſſignee or Deviſee cannot revive by Bill of Revivor or by *Scire facias*, he muſt bring an Original Bill.

If there be neither Privity in Blood, nor in Repreſentation, the Decree or Cauſe muſt be revived by an original Bill, and not by *Scire facias* or Bill of Revivor, and therefore an Aſſignee or Deviſee cannot have a Bill of Revivor, being in Nature of Purchaſers only, and this original Bill is to be in Nature of a Bill of Revivor, and is to be brought alſo againſt an Aſſignee or Deviſee. 1 *Ch. Ca.* 122. 174. 1 *Vern.* 283. 426. 2 *Vern.* 548. 672. *Moſeley's Reports*, 44.

Original Bill by a Deviſee in Nature of a Bill of Revivor Defendant ſhall not make a new Defence.

If a Deviſee brings an original Bill in the Nature of a Bill of Revivor, the Defendant ſhall not be at Liberty to make a new Defence, for this Bill is only to ſupply the Want of Privity, and the Decree ought to be carried on in the ſame Manner, as it would have been on a Bill of Revivor, if the Plaintiff had claimed in Privity, and there is no Reaſon why the Deviſee ſhould not have the ſame Advantage of the Decree as an Heir or Executor, without entering into the Merits of the Cauſe, and the Decree on this Bill ought not to be longer or ſhorter than the firſt. 2 *Vern.* 548.

Nor can a Deviſee on ſuch a Bill brought againſt him, diſpute the Decree.

So if a Bill in Nature of a Bill of Revivor be brought againſt a Deviſee, he cannot diſpute the Juſtice or Validity of the Decree, for then he would be in a better

better Caſe than an Heir or Executor. 2 *Vern.* 672.

A good Argument on ſuch a Bill that ſuch a former Decree was made.

And where an original Bill is brought to have a parallel Decree made, it may be uſed as a good Argument or Inducement to the Court, that there was ſuch a former Decree, to make a like Decree, if no ſufficient Reaſons are ſhowed to the contrary. 2 *Vern.* 548.

Some of the Plaintiffs refuſing to bring a Bill of Revivor the others may bring it.

If ſome of the Plaintiffs refuſe to join in bringing in a Bill of Revivor, the others may bring ſuch a Bill, and make thoſe who refuſed Defendants. 2 *Ch. Ca.* 80.

Unneceſſary to revive againſt a Defendant who hath not anſwered.

It is unneceſſary to revive againſt a Defendant who never anſwered. 1 *Vern.* 308.

In what Caſe a Defendant or his Repreſentative can revive.

No Defendant, or his Repreſentative, can revive in Caſe of Abatement happening before a Decree or final Order be ſigned and enrolled. 2 *Ch. Rep.* 195.

Defendants may revive when a mutual Account is decreed.

But if a mutual Account be decreed, and there happens an Abatement, the Defendant may revive, as each Side are Actors. 2 *Vern.* 219. 297. 1 *Williams*, 263. 743.

But it muſt be upon Dealing in Trade or the like.

But it muſt be upon Dealing in Trade, or the like, and there the Plaintiff ſhall not be admitted to diſmiſs his own Bill after Account decreed. *Ibid.*

Adminiſtrator *de bonis non* may revive a Decree.

If an Adminiſtrator obtains a Decree, but dies before Inrollment, the Adminiſtrator *de bonis non* may revive this Decree within the Equity of the Statute.

A Creditor admitted to come in before the Maſter may revive if the Cauſe abates.

If a Creditor is admitted by Order to come in before the Maſter, and prove his Debt, and pay his Contribution, he is intitled to revive if the Cauſe abates. *Trinity* 1702, between *Pit* and the Creditors of the Duke of *Richmond*. *Abr. Equ. Ca.* 3.

A Cauſe cannot be revived againſt an Infant for want of an Appearance.

A Cauſe cannot be revived againſt an Infant for want of an Appearance, for he has a Right to anſwer, or to plead before the Cauſe can be revived. *Dunkellin* againſt *French* in *Cha.* 1718.

A Decree to an Account, though not revived within ſix Years, yet not within the Statute of Limitations.

If the Decree be to an Account, and the Parties die, if the Executors or Adminiſtrators do not revive within ſix Years, this is not within the Statute of Limitations. 1 *Peer Williams*, 742.

No Revivor of a Diſmiſs with Coſts, or of a Decree for Coſts, only not aſcertained.

Although there may be no Revivor of a Diſmiſs with Coſts, or of a Decree for Coſts only not aſcertained, yet there may be

be for the Duty and Coſts. *Bumb. Rep.* 5. 160. *Select Caſ. in Chan.* 21. 54.

For further Obſervations and Proceedings in Relation to reviving Decrees, *See Title Sequeſtration among Proceſs of Contempt.*

In what Manner a Suit may be revived.

On Abatement Plaintiff may either bring an Original Bill, or a Bill of Revivor.

WHERE a Suit abates, the Plaintiff may either bring an Original Bill, or a Bill of Revivor, at his Election. 1 *Vern.* 463.

A Suit cannot be revived in Part.

A Cauſe cannot be revived in Part, but the whole Proceedings, Bill, Anſwer and Orders, made in the Cauſe muſt ſtand revived; for the Revivor is but a Continuance of the ſame Suit, and it cannot be ſuch a Continuance unleſs it proceeds where the other left off. 2 *Chan. Ca.* 80.

A Decree after Abatement may be carried into Execution three Ways.

Where a Decree hath been obtained, and the Suit abates, and that the Decree is ſought to be carried into Execution, it may be done three Ways.

1ſt. By a *Subpœna Scire facias*, but this only after Inrollment, not before, if the Decree be not

1ſt. If the Decree is enrolled, the Party may ſue out a *Subpœna Scire facias* againſt the Heir, or Executor of the Defendant, to ſhew Cauſe againſt the

inrolled, there must be a Bill of Revivor.

Decree, but this is only after an Inrollment, and not before; for where the Decree is not ſigned and enrolled a Bill of Revivor muſt be brought.

This *Scire facias* formed from the *Scire facias* at Common Law.

And this *Scire facias* was formed from the *Scire facias* at Common Law, for when the Decree is enrolled, it is in the Nature of a Judgment, and a *Subpœna Scire facias* is for the Heir or Executor to ſhew Cauſe why there ſhould not be Execution.

No Demurrer to this *Scire facias*, but the Party may ſhew Cauſe why he ſhould not be charged.

And to this *Subpœna Scire facias* the Defendant cannot demur, for the *Subpœna* is not of Record, nor any where filed, and therefore the Party muſt upon Motion of Counſel at the Return of the *Subpœna*, ſhew Cauſe (if any he hath) why he ſhould not be charged. *Sed vide* 1 *Vern.* 426.

2dly. By Bill of Revivor, which may be either before or after Inrollment.

2dly. As the Party may have a *Subpœna Scire facias* after Inrollment, ſo he may have a Bill of Revivor either before or after Inrollment; for the *Scire facias* (as has been ſaid) is formed according to the Notion of the Common Law, and the Bill of Revivor upon the Canon and Civil Laws, and therefore in a Court of Equity the Plaintiff has his Election of either of the Remedies.

But

But it is ſaid that the ſureſt and ſafeſt Way to carry the Decree into Execution is by Bill of Revivor; for where the Decree was obtained againſt the Anceſtor, and his Heir does not claim under that Title, but by Virtue of another Title paramount, there the Decree can never be carried into Execution againſt him. As where an Eſtate is decreed againſt a Man, and his Heir inſiſts his Father had no Title thereto, or was only Tenant for Life thereof, the Decree in that Caſe can never be carried into Execution againſt him, he is at Liberty to controvert the Juſtice and Validity of that Decree, he may make a new Defence from what his Anceſtor did, and vary his Caſe as he ſhall be adviſed, and the Parties go into a new Examination of the Matter, and the Cauſe is to be heard *De novo*, and the Court judges whether the Decree is right or not, and may affirm or reverſe it at their Pleaſure.

The ſafeſt Way is by Bill of Revivor, and why.

Where the Heir may controvert the Decree and when not.

But when one Man obtains a Decree againſt another for a real Eſtate, and the Party dies before the Plaintiff is put into Poſſeſſion, in that Caſe, if the Heir at Law claims the Eſtate by Deſcent under his Anceſtor, or as Deviſee under him, he ſhall never controvert the Juſtice of the Decree, though his Anceſtor ſhould have miſtaken his Defence, nor ſhall he be at Liberty to make a new Defence,

Ibidem.

or enter into new Proof, ſo as to overthrow the former Decree, eſpecially when it appears to the Court that the Decree hath been of an antient Standing.

An Original Bill may be brought praying that a parallel Decree may be made.

3dly. Or the Plaintiff may bring an Original Bill, praying that a parallel Decree may be made; and in the Caſe of *Spencer* and *Wray*, *Trinity* Term, 1687. 1 *Vern.* 463. it was adjudged, that where the Suit abates, the Plaintiff may either bring an Original Bill, or a Bill of Revivor, at his Election. See alſo 1 *Cha. Ca.* 37. and 1 *Vern.* 476.

An Aſſignee or Deviſee muſt bring an Original Bill.

But if there be neither Privity in Blood, or in Repreſentation, as in the Caſe of an Aſſignee, or Deviſee, the Cauſe muſt be revived by an Original Bill, in the Nature of a Bill of Revivor, praying that a parallel Decree may be made. *Cha. Ca.* 122. 174.

A Decree for Coſts only cannot be revived unleſs they be taxed and a Report made in the Life-time of the Party.

No Bill of Revivor can be brought to revive a Decree relative to Coſts only, unleſs the Coſts be taxed, and a Report made in the Life-time of the Party; for this is *Actio perſonalis et moritur cum Perſona*; but if by the Decree the Party is to pay a Sum of Money, or if a Duty is decreed, if he is to deliver over a Bond, or Deeds, or Writings, or if any Thing is annexed to the Decree beſides Coſts, the Suit may be revived; but

Or unleſs ſomething elſe be annexed to the Decree.

but it can never be revived for Coſts only. 2 *Chan. Rep.* 195.

A Demurrer to a Bill of revivor to revive a Diſmiſs, with Coſts, allowed.

A Bill was diſmiſſed with Coſts, which were taxed, and a Bill of Revivor was brought ſingly for Coſts, and it was demurred too; it was ſaid, in this Caſe, that a Bill of Revivor was not proper, but though the Bill was diſmiſſed, yet it was not ſo much out of Court, but that the Party, who was to pay the Coſts, was ſtill liable to the Proceſs of the Court for ſuch Coſts as Attachment, *&c.* and here the Demurrer was allowed. 1ſt. *Har. Chan. Pract.* 3d Edit. 288.

Where Proceedings may be revived by *Scire facias*, it is at the Plaintiff's Election to do it by Bill.

A Cauſe being heard, and the Decree ſigned and enrolled, the Plaintiff (the Suit having abated) brought a Bill of Revivor, and the Defendant inſiſted he ſhould have revived by *Scire facias*, there being a Decree in the Cauſe, but in regard there were Proceedings relating to Coſts, *&c.* and after the Decree was enrolled, which the *Scire facias* would not revive, the Court held it well enough. 2 *Cha. Ca.* 67. 1 *Ch. Ca.* 37. *Sed vide Antea.*

But *Scire facias* will only revive the Decree and the Proceedings before it.

A Bill of Revivor muſt be where the Decree is not ſigned and enrolled.

But where the Decree is not ſigned and enrolled, a Bill of Revivor muſt be brought. 2 *Cha. Pract.* 105.

Bill of Revivor on a Bill of Revivor.

A Bill of Revivor upon a Bill of Revivor lies. *Hard.* 201.

A Defendant, in the Original Bill alive, ought not to be named in the Bill of Revivor.

If one be named in the Original Bill, who is yet alive, he ought not to be named in the Bill of Revivor, becauſe the Suit never abated. *Quoad him. Ibidem.*

But if named in the Bill of Revivor only, he may be named in every Bill after.

But if named in the Bill of Revivor only, he may be named in every Bill of Revivor after, becauſe he was not named in the Original Bill.

Proceſs of Contempt cannot be revived.

Proceſſes of Contempt cannot be revived, they die with thePerſon. *SedQuær*, if a Sequeſtration has iſſued on a Decree, as to a perſonal Eſtate.

How a Decree of long ſtanding may be revived.

A Bill of Revivor lies not upon a Decree of a long ſtanding, but an Original Bill muſt be exhibited, and the Decree ſet forth as Evidence. 2 *Cha. Cha.* 216.

On a Bill in Equity being abated by Death, the Executor, or Adminiſtrator, is barred by the Stat. of Limitations, if no Revivor within ſix Years, but not after a Decree to an Account.

If on a Bill in Equity the Suit abates by Death, or otherwiſe, the Executor, or Adminiſtrator, muſt bring his Bill of Revivor within ſix Years, elſe the Suit will be barred by the Statute of Limitations, if pleaded; but a Bill of Revivor, after a Decree to an Account, is in nature of a *Scire facias*, and not within or barable by the Statute of Limitations; ſo Decreed in *Hollingſhead*'s Caſe. 1 *Peer Williams* 745; though the Demand ſeemed to be a very ſtale one.

If

Privities in Blood or Repreſentation may revive by *Scire facias.*

If the Parties that would revive the Decree enrolled, be in privity of Blood to the firſt Parties, *viz.* as Heirs, or in Privity of Repreſentation as Executors, or Adminiſtrators, they may Revive by *Subpæna Scire facias.* 2 *Har. Chan. Pract.* 3d Edit. 123.

Of the Service of the *Scire facias*, the Decree, and the Order to revive.

Where a *Scire facias* iſſues to revive the Decree, a Copy of the Writ is to be ſerved on the Party perſonally (if poſſible), and if he does not appear and ſhow Cauſe, why the Decree ſhould not be revived, before the Time appointed for that Purpoſe, by the *Scire facias*, is expired, the Court, upon Affidavit of the Service thereof, and upon an Attorney's Motion thereon, will order the Decree to be revived.

Bill of Revivor lies before or after hearing, it may be to revive only, or to revive and anſwer.

A Bill of Revivor, (as has been ſaid before) may be brought either before or after Hearing; it is ſometimes brought to revive only, and then it is revived without Anſwer, after Appearance upon Motion, ſuggeſting that the Time for anſwering is out; but where it is brought to revive and anſwer, an Attachment, and all the ſubſequent Proceſs of Contempt, may iſſue as on any other Bill, if the Defendant anſwers not in time. *Har. Chan. Pract.* 3d. Edit. 287.

Demurrer, becauſe more was prayed to be revived, than can be revived.

A Bill of Revivor was brought to revive all Proceedings, and particularly an Order by Conſent; the Defendant

dant demurred to the Bill, for that it ſought to revive that Order, whereas the Feme was a Party to it, and ſhe being married ſince her Executorſhip, conſequently her Conſent was determined, and the Demurrer was allowed. *Hampden*, ver. *Brewer*, 1 *Chan. Ca.* 77.

Proceedings in croſs Cauſes not revived without Bill of revivor in each.

Proceedings in croſs Cauſes are not to be revived without a Bill of Revivor in each, becauſe each Plaintiff is Maſter of his own Cauſe; and therefore if the Plaintiff, in the original Cauſe, revive againſt the Heir of the Defendant, that does not make it neceſſary that the Heir of the Defendant ſhould reſume the croſs Cauſe againſt the Plaintiff, unleſs he pleaſes.

Of the Account in Equity, and the Proceedings thereon in this Court.

Account in what Caſes decreed.

WHEN upon a full Hearing the Right to the Matter in Queſtion, or the principal Point hath been determined by the Court, but the Damages or Sum really due cannot then be aſcertained, in ſuch Caſe, the Court refer it to the chief Remembrancer, to audite and ſtate the ſeveral Facts between the Parties relative to the principal Point, and

and to report how much is due after giving all Parties all juſt allowances, to the end, that the Court may make a compleat and abſolute Order, and finally determine the whole, and this brings on the Matter of Account.

Analogous to the Writ of Account.

This was formerly the Buſineſs chiefly of the Courts of Law, where upon an Action of Account being brought, and a Judgment *Quod computet* obtained, then Auditors are aſſign'd by the Court to audite and ſtate the Account between the Parties, and upon their Report the final Judgment is given, which is, *that the Plaintiff is to recover, againſt the Defendant, the Sum he is found in Arrears*; ſo that the Account in Equity is analogous to this Action at Law, and the Decree is but as an acceſſary to the final Judgment.

Matters of Account now chiefly brought into a Court of Equity and why.

But it being found that the Proceedings at Law, upon this Action, are difficult, dilatory and expenſive, it is now ſeldom uſed; beſides, if the Demand be of Conſequence, and the Matter of an intricate nature, in ſuch Caſe it is more adviſeable to reſort to a Court of Equity, where Matters of Account are now commodiouſly adjuſted, and more advantageouſly determined for both Parties, the Plaintiff being, in that Court, intitled to a Diſcovery of Books, Papers, and the Defendant's Oath; and, on the other hand, the Defendant allowed to diſcount

diſcount the Sums paid or expended by him, and all reaſonable Allowances, to diſcharge himſelf of Sums under forty Shillings by his own Oath: If by Anſwer, or other Writing, he charges himſelf, by the ſame to diſcharge himſelf; which will be good, if there be no other Evidence; and is intitled, after the Account is ſtated, to a Decree in his favour, if any thing be due to him on the ballance thereof.

The Proceedings on the Decree to an Account.

When the Court have referred it to the Chief Remembrancer to audite and ſtate the Account between the Parties, and to report how much is due as aforeſaid, and when the Decree is ſettled and ſigned by Counſel for the Plaintiff, and by the Attorney for each Party, and ſigned by the Officer and Baron, and paſſed in ſuch Manner as is hereafter directed, ſee *Title Decree*, &c. then the Plaintiff is to file his Charge, and may then take out a Summons from the Officer, with which he is to ſerve the Defendant's Attorney; and if the Defendant's Attorney doth not attend upon the firſt Summons, the Plaintiff may take out a ſecond Summons, which being ſerved, if the Defendant doth not attend, Plaintiff takes out a third Summons, which being ſerved, if the Defendant's Attorney ſtill neglects to attend, or doth not file a Diſcharge to the Plaintiff's Charge, the Officer will upon Application of the Plaintiff, grant a Certificate of his Attendances upon

upon ſuch Summonſes, and of the Defendant's non Attendance, and that no Diſcharge is filed by the Defendant to the Plaintiff's Charge.

And upon this Certificate, and upon Motion of the Plaintiff's Attorney thereon, the Court will order the Defendant to file his Diſcharge, and attend effectually on the next Summons, or the Officer to proceed and make his Report; and the Plaintiff is then to ſerve another Summons, together with a Copy of the ſaid Order, upon the Defendant's Attorney; and if the Defendant doth not appear upon this laſt Summons, and the Plaintiff proves his Charge, the Officer will proceed and make up his Report upon the Plaintiff's Charge, and the Matters before him, the Draft of which, or a Copy thereof, he gives to the Plaintiff, and the Plaintiff is to proceed to confirm this Report *Ex Parte*, and the Defendant may object thereto in like Manner as if the Defendant had attended. See Page. 32, 33, 34.

Ibidem.

Report *Ex parte.*

If the Defendant files a Diſcharge, he ought regularly to take out a Summons for the Plaintiff, in order to proceed to prove the ſame, if he does not, the Plaintiff may take out Summonſes as aforeſaid; and after Service of three Summonſes, the Officer will grant a Certificate of Plaintiff's Attendances, and the Defendant's non Attendance;

Diſcharge filed and no Summons ſerved by the Defendant, how the Plaintiff is to proceed.

dance; and the Plaintiff's Attorney may upon Motion thereon, obtain an Order that the Defendant may attend effectually upon the next Summons, and prove his Diſcharge, or that the Officer may proceed and make up his Report; and if after Service of another Summons, with a Copy of the ſaid Order as aforeſaid, the Defendant neglects to appear and prove his Diſcharge, the Officer will proceed and make up his Report, as if no Diſcharge had been filed. The Defendant is to proceed in the ſame Manner, if the Plaintiff neglects to attend upon his Summonſes.

And how the Defendant is to proceed on the Plaintiff's Default.

Note, the Charge and Diſcharge are to be engroſſed on Paper, and ſigned by the proper Attorney, with theſe words at the Foot of each, *with Liberty to add and alter as there ſhall be Occaſion*, and are to be filed in the Chief Remembrancer's Office.

Charge and Diſcharge how to be drawn up and Ingroſſed.

If the Defendant ſerves a Summons on the oppoſite Party to attend the Officer, in order to prove his Diſcharge, and neglects to attend, the Plaintiff's Attorney may, on Motion, obtain an Order, that the Defendant ſhall attend the Officer and prove his Diſcharge in a ſhort Day, or that the Officer may make up his Report, which, if the Defendant neglects to do in four Days after

Diſcharge filed, and non Attendance, to prove it after Summons ſerved by the Defendant.

after ſervice of the Order, the Officer will report *Ex Parte.*

Note, each Summons is to be ſerved, twenty-four Hours at leaſt, before the appointed Hour for attending before the Officer.

Summons how to be ſerved.

When the Defendant hath put in his Anſwer to the Plaintiff's Charge, and that both Parties appear before the Officer, he proceeds and allows, or diſallows the Articles, according to the Proofs before him, or Matters ariſing out of the Pleadings; and either Party may examine in Town before the Officer, or take out a Commiſſion to examine in the Country, in aid of the Account, at any Time before the Report is ſigned by the Officer, if from the circumſtances of the Caſe, it ſhall appear proper and neceſſary; and the adverſe Party may croſs-examine the Witneſſes, if he ſees convenient; but he who examines in aid of an Account, muſt firſt have a Certificate from the Officer, that it is neceſſary ſo to do, and thereupon move the Court, by his Attorney, for Liberty to examine.

Attendance before the Officer upon the Charge and Diſcharge.

Examination of Witneſſes, in aid of the Account.

And the Interrogatories are then to be drawn up, and are to be ingroſſed on Parchment, and to be ſigned by Counſel and Attorney, and filed in the Chief Remembrancer's Office; and in this caſe, he or his Deputy, not the Examiner

Interrogatories in aid of the Account, how to be drawn up and ingroſſed, and how the Examination thereon differs from an Examination in Chief.

Examiner of the Court, is to examine the Witneſſes, and the Depoſitions, taken upon this Examination, are publiſhed of courſe, without any Order of Court for that purpoſe. But Note, that nothing is to come under Examination upon the Account againſt the Foundation of the Decree, it is to be relative only to matters of Account, ariſing from the Pleadings, and in Iſſue in the Cauſe.

The Depoſitions publiſhed of Courſe.

No Matters to be examined into upon the Account, but ſuch as are in Iſſue in the Cauſe.

Perſonal Interrogatories in aid of the Account, and the Proceedings thereon.

And either Party may, on ſuch Certificate from the Officer, that it is neceſſary to examine, and on Motion of his Attorney thereon, obtain an Order for liberty to exhibit perſonal Interrogatories to the oppoſite Party, in aid of the Account; and when the Interrogatories are filed, his Attorney may, upon Motion, obtain another Order for the oppoſite Party to anſwer the Interrogatories in the uſual Time: And this laſt Order is to be ſerved on the Party; and, if in four Days after Service thereof, an Anſwer is not filed, or further Time prayed to anſwer the Interrogatories, the Court, upon an Attorney's Motion, on Affidavit of the Service of the Order, and a Certificate of no Anſwer being filed, will award an Attachment to the Purſuivant.

Attachment to the Purſuivant for not anſwering the Interrogatories.

The proceedings where it is neceſſary to have Deeds brought in upon the Account.

So, where it is neceſſary that either Party ſhould produce any Deeds or Writings upon the Account, the Officer is to certify the ſame, and upon ſuch Certificate

Certificate, and upon an Attorney's Motion thereon, the Court will Order that the Deeds mentioned therein may be brought in and depoſited with the Officer, in ſuch time after Service of the Order as the Court ſhall appoint, which is generally four Days; and if the Party who has the Deeds makes default, or refuſes to bring them in within the time appointed, the Court on Affidavit of the Service of the Order, and a Certificate from the Officer that the Deeds are not lodged, will attach him. But, the Party who ſhall be required to bring in ſuch Deeds or Writings, may conteſt the bringing of them, if he apprehends it might prejudice him in any ſort.

Anſwer to perſonal Interrogatories ſhort and Exceptions thereto.

If the Anſwer to perſonal Interrogatories be ſhort, the oppoſite Party may except thereto, and theſe Exceptions are to be referred to a Baron, and to be proceeded on in the ſame Manner with Exceptions to ſhort Anſwers to Bills. See Title *Exceptions*. But in this Caſe, if the Anſwer be reported ſhort, and the Report confirmed, and a further Anſwer not filed in four Days after the Report is confirmed, an Attachment is awarded to the Purſuivant on Counſel's Motion, and Certificate as aforeſaid.

Attachment to the Purſuivant if a further Anſwer be not filed after Report confirmed.

Note, the perſonal Interrogatories, and the Anſwer thereto, are to be drawn

The Method of preparing the perſonal Interro-

gatories and the Anſwer thereto.

by Counſel; to be engroſſed on Parchment, to be ſigned by Counſel and Attorney, and to be filed in the Chief Remembrancer's Office; but the Defendant is not to be examined upon theſe perſonal Interrogatories as Witneſſes are upon the other Interrogatories, he is to Anſwer them in the ſame Manner as he does the Plaintiff's Bill.

Diſpute about the propriety of the perſonal Interrogatories, the Officer to ſettle the Interrogatories.

In the Caſe of Braddell againſt Gaven in this Court, *Hillary* Term 1748, a Diſpute aroſe between the Parties about the Propriety of perſonal Interrogatories exhibited in aid of the Account, and upon a debated Motion, the Court referred it to the Chief Remembrancer to ſettle the Interrogatories, and this was held to be the uſual method in ſuch Caſes.

Interrogatories, when prepared, a Copy thereof to be ſerved, and a Summons to attend.

And when the perſonal Interrogatories are prepared by the Perſon who exhibits them, a Copy thereof is to be ſerved on the oppoſite Party, with a Summons from the Officer to attend him on ſetling the ſame.

Interrogatories, how to be ſettled, and the proceedings on the Draft.

When the Officer hath ſetled the perſonal Interrogatories purſuant to the Order, he ſigns the Draft, and gives it to the Attorney for the Party who exhibits the Interrogatories, which is to be ſerved in the ſame Manner as the Draft of the Officer's Report, and when the four Days for objecting to the Draft

Draft of the perſonal Interrogatories are expired, if no Objections be put in, the Party exhibiting the Interrogatories may put a Rule on the oppoſite Party to anſwer the Interrogatories. *See Page* 30.

If either Objections, or Exceptions, be taken to the Draft of the perſonal Interrogatories, the Proceedings are the ſame as upon Objections, or Exceptions, being taken to the Draft of the Officer's Report on the Account, which ſee hereafter.

Objections, or Exceptions, if taken to the Draft, the Proceedings thereon.

Any Article in Account before the Officer of or under forty Shillings, the Oath of the Party ſhall be ſufficient to diſcharge him, but for any Article above forty Shilling there muſt be a Voucher.

RULE. The Oath of the Party to be ſufficient for any Article of, or under 40*s.*

Note, the Officer is not to examine any Witneſſes on the Account *Viva voce*, unleſs by Conſent of the Parties, and the Conſent and Examination are to be entered in his Book of References.

No Examination *viva voce* on the Account but by Conſent.

In the Cauſe Adminiſtrator of *Atkinſon* againſt Executor *Dickſon* in this Court, *Eaſter* Term 1750, it was determined, on full Debate upon the Hearing, that Proofs taken upon the Examination in Chief, may be read before the Officer in Aid of the Account, although they

Proofs taken upon the Examination, in Chief, may be read before the Officer in Aid of the Account, though not entered as read on the Hearing.

they be not entered as read upon the Hearing.

Report drawn up by the Officer, and the Proceedings thereon, and on the Objections thereto.

When the Parties have gone through the Charge and Diſcharge upon the Proofs and Evidences, the Officer draws up his Report, the Draft of which, or a Copy thereof, he gives to either Party requiring the ſame; and the Draft or Copy is to be ſerved by the Party, in whoſe Favour it is made, upon the oppoſite Party; but the Officer is firſt to write upon the Back thereof, a Notice to the Party on whom it is to be ſerved, that it is a Draft of this Report, and that the Party is to object to the ſame in the uſual Time, or that he will ſign his Report; which Notice is to be dated, but the Draft of the Report is not to be dated; nor are the Sums contained therein to be caſt up, and if the Party on whom the Draft is ſerved, ſees Cauſe to object thereto, he is in four Days to return the Draft with his Objections in Writing, ſigned by his Attorney, that the Officer may rectify the ſame, if he ſees Reaſon ſo to do, and is to ſummons the Party, in whoſe Favour the Report is made, to attend the Officer upon ſuch Objections, or the Party, in whoſe Favour the Report is, may ſerve the oppoſite Party with Summonſes (as aforeſaid) to ſupport his Objections, and upon the Officer's Certificate of Non-attendance, move by his Attorney to diſcharge them, and the Officer may ſign his Report.

If

If the Party objecting ſerves the oppoſite Party with a Summons to attend the Officer to ſupport his Objections, and neglects to attend, the Attorney for the oppoſite Party, may, upon Motion, obtain an Order, that the Party objecting may attend the Officer, and ſupport his Objections in a ſhort Day, or that the Officer may ſign his Report; which if he neglects to do, in four Days after Service of the Order, the Officer will ſign his Report. Ibidem.

If no Objections be filed to the Draft of the Report within the Time appointed for objecting thereto, the Officer will ſign the Report; and it will not be amiſs to produce to the Officer an Affidavit of the Service of the Draft, though it is not abſolutely neceſſary. Ibidem.

Proceedings to confirm the Report when ſigned by the Officer.

When the Report is ſigned by the Officer, the Plaintiff, or the Party in whoſe Favour it is made, may by his Attorney move the firſt Rule to confirm it, which is, that it ſhall be confirmed unleſs Cauſe be ſhewn to the contrary in four Days, and this Order is to be ſerved on the oppoſite Party, and in four Days after Service, upon Affidavit thereof, and a Certificate from the Officer of no Cauſe being ſhewn againſt confirming the Report, the Court will, upon Motion of the Attorney for the Party in whoſe Favour it is made, confirm the ſame abſo-

abſolutely, and the Plaintiff's Attorney may the ſame Day move the Court to have the Cauſe ſet down to be heard on the Officer's Report and Merits, and the Court will grant an Order for that Purpoſe.

Exceptions to the Officer's Report, and the Time for filing them.

But if either Party apprehends himſelf aggrieved by the Report, he may (at any Time before it is confirmed) take Exceptions thereto, but no Matter is to be made a Matter of Exception which was not made an Objection to the Officer's Draft of his Report; and this is in order to ſave unneceſſary Trouble to the Court, for if the Party had objected he might have ſhewed the Officer his Error, and he would have altered his Report in that Particular. See *Bunbury's Reports*, 92.

The Time enlarged, on good Cauſe ſhewn.

If the Account hath long depended before the Officer, or where the Exceptions are very numerous, and that there is not Time to file them in the four Days, or for other good Reaſon, the Court on Counſel's Motion, will give Time to file the Exceptions beyond the four Days.

The Proceedings on the Exceptions to the Report.

If Exceptions be filed to the Officer's Report upon the Account, the Party excepting, upon filing the ſame, is to depoſit four Pounds with the Officer; and when this is done it is a Motion of Courſe to ſtay the Proceedings on the Report,

Report, then the Exceptant, or the other Party may move the Court, that the Cauſe may be ſet down to be heard upon the Officer's Report and Exceptions; and if upon the Hearing the Exceptions be allowed, then the Report is ſent back to the Officer, to have the ſame rectified, and when the Report is rectified, it is to be confirmed as is before directed; and the Cauſe may then, upon Motion of the Plaintiff's Attorney, be ſet down to be heard upon the Report and Merits; and the ſame Motion may be made after ſuch Exceptions are over-ruled.

Cauſe ſet down to be heard on the Report and Merits.

And in Caſe the Exceptions be allowed, forty Shillings is to be paid back to the Exceptant, out of the four Pounds depoſited with the Officer upon filing the Exceptions; if they be over-ruled, the forty Shillings is to be paid to the oppoſite Party.

How the Coſt is to be diſpoſed of in allowing or over-ruling the Exceptions.

No Perſon ſhall except twice to the ſame Matter, nor can the Acceptant add to or alter his Exceptions after filed, but by ſpecial Leave of the Court for that Purpoſe.

No excepting twice, nor adding to or altering Exceptions but by ſpecial Leave.

In the Caſe of *Stoddart* againſt *Gore* and others in this Court, *Trinity* 1744, it was alledged, that every Thing read before the Officer as Evidence, muſt be alſo read before the Court, unleſs the Exceptant in his Exceptions, does except

The Rule relating to the reading of any Matter of Evidence on the Hearing, which was produced before the Officer on the Account.

to ſuch Evidence; but Mr. *Stannard* inſiſted that the Practice is not ſo, unleſs the Officer ſets out the Proofs in his Report, if he does not, the Party may, on the Hearing, except to the reading of the Evidence, although he doth not, in his Exceptions except to it; and the Court allowed this to be right.

Draft of the Report *Ex parte* to be ſerved.

And Note, that in all Caſes the Draft of the Officer's Report is to be ſerved upon the oppoſite Party, as well where both Parties have attended, as where the Officer hath proceeded *Ex Parte*, and the after Proceedings are the ſame.

No Notice to be given of an Affidavit relative to the Account, but a Day will be given to the oppoſite Party who is to take out the next Summons.

It is not practiſed to give Notice of Affidavits filed relative to the Matter of Account before the Officer, but the Officer will give the oppoſite Party a Day to conſider the Affidavit, and he is in ſuch Caſe to take out and ſerve the next Summons.

After the Report is made up no Diſcharge or additional Diſcharge to be filed without Leave of the Court.

After the Officer hath made up his Report, the Defendant ſhall not be admitted to file a Diſcharge, or additional Diſcharge, without Leave firſt obtained from the Court for that Purpoſe, which, upon ſpecial Reaſons, the Court will grant; ſo held in the Caſe of *Braddel* and *Gaven* in this Court, *Hillary* 1748; and the Defendant may then take out a Summons for the Plaintiff, in order to proceed to prove the Diſcharge or further Diſcharge, the Proceedings whereon

whereon are as before directed, and upon the Defendant's Default in ſupporting ſuch Diſcharge, or further Diſcharge, the Officer ſhall ſign his Report; the ſame Rule holds as to the Plaintiff's filing a Charge, or additional Charge, after the Officer hath ſigned his Report.

The like as to a Charge or further Charge.

When the Day for hearing of the Cauſe on the Officer's Report, and the Merits is appointed, the Plaintiff's Attorney is to take out the Order for Hearing, and is to ſerve the Defendant's Attorney therewith four Days at leaſt before the Day of Hearing, that is four Days excluſive of the Day on which the Order is ſerved, and the Day appointed for Hearing; and he is to have this Order, and an Affidavit of the Service thereof, ready to produce on the Hearing; as alſo the decretal Order, the Officer's Report, and the Order for confirming it. But note, on this Hearing upon the Report and Merits, there is no Occaſion to ſerve the Defendant with a *Subpœna* to hear Judgment.

The Proceedings on the Hearing upon the Officer's Report and Merits.

And when the final Decree is pronounced it is to be ſerved and ſettled, and to be afterwards ſigned by the Lord Chief Baron and enrolled, as is hereafter directed. *See Title Decrees.*

And on the final Decree.

Who are intitled to have an Account, againſt whom it lies, and in what Caſes.

What Perſons were chargeable in Account at common Law.

BY the Common Law, none could be charged in Account but as Guardian in Soccage, Bailiff, or Receiver, except in favour of Merchants, and for advancement of Trade, where, by the Law of Merchants, one naming himſelf Merchant, might have an Account againſt another naming him Merchant, and Charge him as his Receiver. 1 *Inſt.* 372. *a.* 11. *Co.* 89.

A Court of Equity, the proper Court for Matters of Account.

But Remedies for or againſt the Executors or Adminiſtrators of Guardians, Bailiffs and Receivers, or for or againſt Joint-tenants, Tenants in Common, their Executors, or Adminiſtrators, were uſually had in Chancery. And though by the Statute 3 and 4 *Ann. ch.* 16, Actions of Account may be brought againſt the Executors and Adminiſtrators of every Guardian, Bailiff and Receiver, and by one Joint-tenant, and Tenant in Common, his Executors and Adminiſtrators againſt the other as Bailiff for receiving more than his Share, and againſt their Executors and Adminiſtrators. Yet ſtill are Matters of Account thought more properly cognizable in in Equity than Law, as the Party can have a Diſcovery of Books, Papers, and

and the Benefit of the Defendant's Oath, and eſpecially if there are mutual and variety of Demands, in which Caſes the Parties may more eaſily have an equal Meaſure of Juſtice, by ballancing or diſcounting them before a Maſter. And as this will give a Court of Equity Juriſdiction, ſo likewiſe, if there are different Parties concerned in Intereſt; but if any doubt ariſes about a particular demand, it may be directed to be aſcertained by an Iſſue and Verdict at Law. *Abr. Eq. Ca.* 5.

Account againſt the Adminiſtrator of an Apprentice employed as Factor.

If a Merchant employs his Apprentice as a Factor beyond Seas, who dies, the Merchant ſhall have an Account againſt the Adminiſtrator of the Apprentice. *Nel. Ch. Rep.* 125.

Infant not compellable to Account as Factor, and in what Caſes he ſhall or ſhall not be charged.

It was held by the Court, that an Infant was not compellable to Account as Factor, tho' it was urged that by the Cuſtom of Merchants he may; but, an Infant may be Executor, and ſhall be charged, becauſe the Law enables him; ſo he may be charged in Trover, becauſe a Tort; but not on Contract, nor as Bailiff, or for Goods to carry on a Trade; and therefore, when Infants are Factors, their Friends ſhould give Security for their Accounting. *Trin.* 1700, between *Smally* and *Smally*. *Bac. Eq. Ca.* 6.

A Servant or Apprentice ſhall not account for Money received by him and ſwern to be laid

If a Man by Anſwer ſwears, that what he received he received as a menial

out for his Maſter's uſe.

menial Servant, and hath paid it over to his Maſter, he ſhall not be put to Account again, but he ought to diſcloſe this Matter in his Anſwer. 1 *Vern.* 136.

Ibidem.

So on Exceptions to a Maſter's Report, which had reported the Defendant's Anſwer inſufficient, the Lord Keeper declared that it was ſufficient for a Servant, or Apprentice, in Anſwer to a Bill for an Account, to ſay in general, that whatever he received, was by him received and laid out again by his Maſter's Orders. *Mich.* 1683, between *Potts* and *Potts.* 1 *Vern.* 208.

An Intruder ſhall account with an Infant throughout for the Profits of the Land.

If a Man during a Perſon's Infancy receives the Profits of an Eſtate to which the Infant is intitled, and continues to do ſo for ſeveral Years after the Infant comes of Age, before any Entry is made upon him, yet he ſhall account for the Profits throughout, and not during the Infancy only. *Paſch.* 1699, between *Yallop* and *Holworthy.* That an Infant ſhall have an account of Profits againſt an Intruder, *Vide* 1 *Vern.* 295; but if there be a Verdict againſt his Title, he muſt recover at Law firſt.

Otherwiſe where there is no Infancy, Truſt, nor Entry made.

But if there is no Truſt, nor Infant in the Caſe, nor any Entry made by him who is intitled to the meſne Profits, equity will not Decree any account

count of the Rents and Profits. 2 *Vern.* 724.

Two Perſons agreed for the Purchaſe of an Eſtate in Moieties between them, which Eſtate was Subject to ſeveral Incumbrances, which were to be diſcharged out of the Purchaſe Money; one of them had Abatements made to him by ſome of the Incumbrancers of ſeveral Sums due for Intereſt and otherwiſe, which they, in Conſideration of Services and Friendſhip, agreed ſhould be to his own uſe; yet, on a Bill brought for an Account of the Rents and Profits, the Court would not allow him the Benefit of theſe Abatements, excluſive of the other, but held that he muſt Account for them, the Purchaſe being made for their equal Benefit, and on a mutual Truſt between them. *Trin.* 1728, at the Rolls between *Carter* and *Horn*. *Bac. Eq. Ca.* 7.

Two Perſons purchaſe an Eſtate in Moieties, and Abatements are made to one of them by the Incumbrancers, the other ſhall have an equal benefit thereof.

Matters

Matters to be brought into the Account, what ſhall be allowed or diſcounted, where an Accountant may charge or diſcharge himſelf, and how the Particulars are to be aſcertained.

No allowance to a Mortgagee or Truſtee who manage the Eſtate themſelves, but otherwiſe if they employ a Bailiff.

IF a Mortgagee or Truſtee manage the Eſtate themſelves, there is no Allowance to be made them for their Care and Pains, but if they employ a ſkilful Bailiff, and give him twenty Pounds *per Annum*, that muſt be allowed, for a Man is not bound to be his own Bailiffe. *per Cur.* 1 *Vern.* 316.

A Parent not allowed to diſcount for Maintenance.

One deviſeth two Hundred and fifty Pounds to his Son, and makes his Wife Executrix, who marries another Huſband; in a Bill brought againſt them for the Legacy, by the Son, the Defendants would have diſcounted Maintenance and Education, which the Court would not permit, for it was ſaid that the Mother ought to maintain the Child; but a Sum of Money paid for binding him Apprentice was allowed to be diſcounted. 2 *Vent.* 353.

A perſon invited as a Gueſt ſhall not be charged with Diet and Lodging.

The Plaintiff comes as a Gueſt to the Defendant's Houſe, at her Invitation, and the Defendant inſiſted on five Pound a Week for Diet and Lodging, alledging that ſhe being a Perſon of Quality, and courted by ſeveral Noblemen, much was

ſpent

ſpent in Entertainments, and prayed it might be allowed her in Account; but the Lord Chancellor ſaid, it was no honourable Demand, and Decreed an Account without any ſuch Allowance, it appearing that the Defendant came at the Plaintiff's invitation; between *Arundell* and *Roll. Mich.* 1681. 1 *Vern.* 19.

Accounts between Merchants may be evened by way of Eſtopel.

It was inſiſted upon (and not denied) to be a Cuſtom between Merchant and Merchant, that all Accounts ſhould be evened on either ſide, by way of Eſtopel, eſpecially when the Buſineſs is of the ſame Employment. 2 *Chan. Ca.* 7.

Diet and Lodging diſcounted againſt a Bond.

The Defendant had a Bond from the Plaintiff for fifty Pound in 1684, and in 1685 the Defendant lodged and dieted with the Plaintiff, and in 1699 the Defendant brought an Action at Law on the Bond againſt the Plaintiff, who brought his Bill to have a Diſcount for the Diet and Lodging, and though there was no Agreement for that purpoſe, and ſuch length of Time paſſed, yet the Maſter of the Rolls decreed it to an Account; and ſaid ſo it ſhould be, if the Defendant had been a Bankrupt, the Plaintiff ſhould have had a Diſcount againſt the Commiſſioners or Aſſignees, and that a Diſcount was natural Juſtice in all Caſes. *Hill.* 1699, between *Arnold* and *Richardſon*, *Bac. Equi. Ca.* 8.

Diſcount natural Juſtice in all Caſes.

So

Diſcount, though it may make a Devaſtavit in Executors.

So where two Perſons had mutual Dealings, but before their Accounts were ſettled, one of them died, and the Survivor brought a Bill againſt his Executors to have an Account, and that the Plaintiff might diſcount what he was to pay, out of what the Executors were to pay him; and it was decreed accordingly, altho' it was objected, it may make a *Devaſtavit* in the Executors. *Mich.* 1701, between *Beaumont* and *Grover*, *Ibidem.*

Where an Account is of a long ſtanding, the Party may be allowed to prove ſatisfaction on Oath.

An Account being of twenty Years ſtanding, it was ordered, that the Defendant may prove on Oath, what he cannot prove by Books and cancelled Bonds, it being of ſo long a ſtanding; between *Peyton* and *Green.* 1 *Ch. Rep.* 146. an Account of fourteen Years ſtanding admitted to be proved by Oath. 1 *Cha. Ca.* 127.

Ibidem.

General Expences not allowed, the particulars muſt be named.

The Court will not allow any thing to be placed to Account, under the Head of General Expences, the Party muſt name the Particulars. *Nel. Ch. Rep.* 117.

The Defendant on Account ſhall be diſcharged by his own Oath of Sums under forty Shillings, but muſt mention to whom paid, and for what, and when; but the Plaintiff ſhall not

The Defendant on Account ſhall be diſcharged by his Oath of Sums under forty Shillings, but a Party ſhall not by way of Charge, charge another Perſon ſo. 2 *Cha. Ca.* 249. *Vide* 1 *Vern.* 283. *S. P.* where it is ſaid that he muſt mention to whom paid, for what, and when.

Vide

Vide 1. *Vern.* 470. where it is ſaid that the Court being informed that the Courſe was, that an Accountant was to be allowed on his own Oath all Sums not exceeding forty Shillings, ſo as the whole was not one hundred Pounds, declared that Rule ſeemed very unreaſonable, and would conſider how to rectify it.

charge him on Oath with ſuch Sums.

In Account between the Plaintiff and a Gardener and the Defendant a Seedſman, the Defendant ſhall be allowed Sums under forty Shillings by way of Diſcharge upon his Oath, but the Plaintiff ſhall not be allowed any thing on his Oath, between *Marſhefield* and *Weſton*. 2 *Vern.* 176. This is now the eſtabliſhed Practice in *Chantery*.

Ibidem.

A Man who charges himſelf by his Books, or by his Oath in Account, ſhall be allowed to diſcharge himſelf in the ſame Manner; but if he is diſproved in any particular, he may be put to prove the whole. *Bat. Equ. Ca.* 10, 11.

A Man who charges himſelf by Oath, or by his Books, ſhall in like manner diſcharge himſelf.

What ſhall be a good bar to a Demand of an Account, and where an Account once ſtated ſhall be concluſive.

A good bar to a demand of an Account, that the Goods taken in Execution were offered the Plaintiff, at the ſame Price the Defendant gave for them.

A Prays to have an Account of the ſale of Goods taken in Execution at an Undervalue; the Defendant pleads that before he bought the Goods of the Sheriff, and afterwards, they were offered to the Plaintiff for the ſame Price he gave for them; and the Plea was allowed good. *Nel. Ch. Rep.* 111.

A Party altering a bundle of Papers his whole Account diſallowed.

An Account was decreed between the Plaintiff and Defendant, and it being proved that the Defendant had altered a Bundle of Papers, and it being likewiſe reported by the Maſter, that he had ſuppreſſed the Evidence, the Lord Chancellor diſallowed the Defendant's whole Demand, though he ſwore he had produced all the Papers, and his Lordſhip declared he was ſatisfied, that all the Papers were produced. Between *Ward* and *Beresford*, *Paſch.* 1687. 1 *Vern.* 452.

If Error appears in an Account ſtated, the Parties ſhall go to a new Account.

Though an Account be ſtated under Hand and Seal, yet if there appears any Miſtake in it, the Court will order the Parties to go to a new Account. 3 *Ch. Rep.* 18.

Mor-

Mortgagor and Mortgagee ſettle an Account before a Maſter, and now a ſubſequent Mortgagee ſues for a new Account, ſuppoſing a former Account to be falſe, and made by Conſent and Fraud but did not inſiſt on any Particulars. The Lord Chancellor declared, that the Account ſhould bind the ſecond Mortgagee, if the Fraud and Colluſion were anſwered. *Trin.* 29 *Car.* between *Needler* and *Deeble.* 1 *Ch. Ca.* 299.

A ſecond Mortgagee bound by an Account ſettled between the Mortgagor and firſt Mortgagee, if no fraud or colluſion appears.

A Is Tenant for Life of a Truſt, Remainder to his Sons; *A* before a Son born brings a Bill againſt the Truſtees, and an Account is decreed, and afterwards taken: This Account ſhall bind the Sons, for all Perſons that could be made Parties, were Parties to the Suit; between *Leonard* and *Com. Suſſex*, *Mich.* 1705. 2 *Vern.* 526.

An Account between all the Parties who could be Parties at the Time ſhall conlude all others.

An Account taken and a Diſtribution decreed in the Spiritual Court of a perſonal Eſtate, yet a new Account decreed in *Chancery.* 2 *Vern.* 47.

A Bill for an Account allowed in *Chancery*, after a Decree in the Spiritual Court.

The Plaintiff's Huſband and the Defendant had dealings together as Merchants, the Bill was for an Account, and although it was agreed that Length of Time was no Bar, yet the Plaintiff's Huſband living many Years after the Trade and Dealings between them ceaſed, and acquieſcing to the time of

What Acquieſcence ſhall be concluſive among Merchants.

his Death, the Court diſmiſſed the Bill, and left the Plaintiff to recover at Law if ſhe could. Between *Sherman* and *Sherman*, *Mich.* 1692. 2. *Vern.* 276..

Ibidem. Among Merchants it is looked upon as an Allowance of an Account current, if the Merchant who receives it, does not object againſt it in a ſecond or third Poſt. *Per Hutchins* Lord Commiſſioner. 2 *Vern.* 276.

A Decree to an Account though not revived within ſix Years, yet not within the Statute of Limitations. If the Decree be to an Account, and the Parties die, if the Executors or Adminiſtrators do not revive within ſix Years, this is not within the Statute of Limitations. 1 *Peer Williams* 742.

Affidavits.

First, *Of Affidavits, with Directions for drawing, ſwearing, filing, and uſing them.*

Affidavits what. AN Affidavit generally ſpeaking is an Oath in Writing, ſworn before ſome Perſon, who hath Authority to adminiſter ſuch an Oath.

Their Uſe. And Affidavits are uſually for certifying the ſervice of Proceſs, or other Matters touching the Proceedings in a Cauſe, and generally where any Motion is made that

that is not of courſe, an Affidavit of the Facts is neceſſary.

What to contain.

The true place of Reſidence, Age and Addition of every Perſon who makes an Affidavit ought regularly to be inſerted therein: And it ought to contain the matter of Fact only, which the Party intends to prove thereby, and not any of the Merits of the Cauſe.

Affidavits may be joint and ſeveral or joint or ſeveral.

An Affidavit of ſeveral Perſons by the Manner of wording it, may be made either joint and ſeveral, or joint or ſeveral: And great Care and Exactneſs ſhould be obſerved in drawing Affidavits,

To be fairly written.

they ought to be fairly written in one Hand, without Blots or Interlineations of any Words of Subſtance, otherwiſe the Perſon impowered to take ſuch Affidavits may refuſe to accept them, or if he does, the Officer of the Court, or his Deputy may refuſe to file them, and no Uſe ſhall be made thereof in this Court.

But where ſmall Blots or Interlineations happen, if they be entered down in Writing at the Foot of the Affidavit, before it be ſworn, it will be accepted.

Before whom to be Sworn.

Either the Plaintiff or Defendant may make an Affidavit which muſt be ſworn before the Lord Treaſurer, Chancellor, one of the Barons of the Court, or before a Maſter extraordinary in the Country;

but the latter are not to take any Affidavits in *Dublin*, or within ten Miles thereof; and every Maſter extraordinary is to expreſs the Day when, and Place and County where he takes it or it ſhall not be authentick or filed; nor ſhall any Affidavit be read in Evidence at any Trial, though it ſhall be uſed upon Motions, for an Affidavit is not to be taken or admitted tending to the Proof or diſproof of the Title, or matter in Queſtion, or touching the Merits of the Cauſe; nor ſhall any Matter be craftily or colourably inſerted in any Affidavit of Service of Proceſs, *&c.*

Maſtere Extraordinary their Duty on taking Affidavits.

Affidavits no Evidence.

And to all Affidavits ſworn in this Court, the Deponent muſt ſign his Name or Mark on the left Hand Side of the Affidavit; and the Jurat. is to be on the right ſide; and the Affidavit muſt be filed in due Time after Swearing, and before any Motion is made thereon, and twenty four Hours Notice at leaſt ſhould be given to the adverſe Party of the filing of every Affidavit to be uſed in Court; and it ought to be filed the Day before the Motion is made, or ſo long before as that the other Side may have Time to take a Copy of it; and authentick Copies of ſuch Affidavits atteſted by the Officer or his Deputy are to be always moved upon, and read in Court, or they need not make, paſs, or enter any Order or Rules for Attachments, or Proceedings grounded thereon. And note that all

The Time for filing Affidavits.

Atteſted Copies thereof muſt be produced.

all Affidavits muſt be expreſſed to be in a Cauſe then depending in Court, though they concern ſome collateral Matter, or they will not be admitted to be read.

To be in a Cauſe depending in Court.

It is not practiſed to give Notice of Affidavits filed upon the Matter of Account before the Officer, but the Officer will give the oppoſite Party a Day to conſider the Affidavit, and he is in ſuch Caſe to ſerve the next Summons.

No Notice of Affidavits being filed relative to a Matter in Account before the Officer.

In all Affidavits of the Service of any of the Proceſs or Orders of the Court, the Addition and Place of Abode of the Perſon who ſerves them muſt be inſerted, as alſo the Day and Place of Service, as well where the Service is perſonal as otherwiſe; that the Party ſerved may have an Opportunity of diſproving it, ſhould the Affidavit be falſe (as there is Reaſon to fear is too often the Caſe) by ſhowing he was on that Day in another Place, which in our Laws is called the *Alibi* Proof; otherwiſe, the Perſon who ſwore falſely cannot be convicted of Perjury. It muſt alſo appear, and eſpecially where the Service is not perſonal, that the Perſon ſerved was at the Time of Service above the Age of ſixteen Years, and formerly the Age of the Perſon who made the Affidavit was uſually inſerted in it, and if it was ſo ſtill, it would not be amiſs, and eſpecially in Affidavits ſworn before Commiſſioners in the Country.

What to contain.

And the method of ſwearing them, where Perſons are, and where they are not literate.

And every Perſon who makes an Affidavit is to ſign his Name, or if he cannot write, to make his Mark on the left Hand ſide of the Affidavit, and he is to ſwear that he has read it, or, if he cannot read, that it has been read to him, and that the Contents of it are true; but in this laſt Caſe, the Perſon who reads it, is to be ſworn that he read it truly, and is alſo to ſign his Name under the Name of the Perſon who makes the Affidavit.

Affidavit to ground an Attachment when to be filed.

'Tis ſufficient to file an Affidavit any Time before, or on the Day an Attachment is made out, but not afterwards.

Affidavits of the Service of Proceſs in *England* how to be, and the Proceedings thereon.

Affidavits of the Service of any Proceſs, *&c.* out of this Court upon any Perſon in *England*, may be ſworn before one of the Barons of the *Exchequer* there, and ſhall be allowed of in this Court; but an Affidavit muſt be made by ſome Perſon before a Baron here, that he was preſent when the Perſon who ſerved the Proceſs in *England*, ſwore the Affidavit thereof before the Baron in *England*, and that he ſaw the Baron there, ſubſcribe or ſign his Name to the ſaid Affidavit, and this is the Practice of the Court of *Chancery*, the Affidavit being ſworn before a Maſter, and in this Court, if Contempts are to be entered againſt the Defendant on ſuch an Affidavit, an Attorney is firſt to move the Court, thereon for Liberty to enter them, which

the

the Court will grant if the Affidavit be full; ſo determined in the Caſe of the Attorney General againſt *Carroll* in the Pleas Office of the Revenue ſide of this Court, *Michaelmas* Term 1753; the Chief Baron having gone off the Bench to the Lord Chancellor on purpoſe to confer with him thereon; but the *Chancery* and *Exchequer* in *England* admit an Affidavit ſworn before a Baron or Maſter here, without requiring Proof of his Hand-writing, or any Proof of the Affidavit being ſworn.

It is ſaid that the Hand-writing of the *Engliſh* Baron has been proved by a Perſon acquainted therewith, though he did not ſee him ſign the Affidavit. Ibidem.

When the Court ſhall order an Affidavit to be taken off the File, to have the Party convicted of Perjury, it is to be delivered to the Clerk of the *Niſi Prius*, for which, he is to give a Receipt; but the Motion for this Purpoſe is not uſually granted untill after a Bill of Indictment is found. Affidavit taken off the File to convict one of Perjury.

By 4th. *W.* and *M.* Ch. 4. The Chief Juſtice or other Juſtices of the *King's Bench*, or any two of them, whereof the Chief to be one, and ſo of the *Common Pleas*, and alſo the Lord Treaſurer, Chancellor and Barons of the *Exchequer*, or any two, &c. whereof The Judges may impower Perſons to take Affidavits in the Country.

whereof the Lord Treaſurer, Chancellor, or Lord Chief Baron to be one, may by Commiſſion under their Hands, and the ſeveral Seals of the reſpective Courts from Time to Time, impower as many Perſons as they ſhall think fit, in all the Counties of this Kingdom, to take ſuch Affidavits, as any ſhall be deſirous to make * concerning any Cauſe depending in any of the ſaid Courts; and any Judge of Aſſize on his Circuit, may take ſuch Affidavits, which ſhall be of the ſame Force, as Affidavits taken in the ſame Courts are; and the Fee of one Shilling *Sterl.* to be received for taking and ſwearing the ſame. Perſons ſwearing falſely in ſuch Affidavits to be liable to the ſame Penalties as if ſworn in open Court. No ſuch Affidavit to be made Uſe of in any of the Courts aforeſaid, unleſs the Commiſſioners taking the ſame, Mention in the Caption thereof, the Day when, and Place and County where the ſame was taken and ſworn. Neither ſhall Affidavits taken as aforeſaid, be read or made Uſe of in any of the ſaid

Judges of Aſſize on Circuit, may take ſuch Affidavits.

Fee 1*s.*

Swearing falſely, the Penalty.

The Duty of the Commiſſioners, on taking ſuch Affidavits.

To be filed before uſed.

* Concerning any Cauſe depending. If Affidavits taken before Commiſſioners in the Country, upon 29 *Car.* 2. Ch. 5. *Eng.* (which is to the ſame Effect with this Act) be expreſſed to be in a Cauſe depending between *A* and *B*, and there is no ſuch Cauſe in Court, they cannot be read, becauſe the Commiſſioners have no Authority to take them, and there can be no Perjury; otherwiſe, if there be a Cauſe in court, and this concerns ſome collateral Matter. *Salk.* 461. The King ver. *Jones.*

ſaid Courts before the ſame be filed there.

By 1 *Geo.* 2 *c.* 5. every Quaker required upon any lawful Occaſion to take an Oath in any Caſe where by Law an Oath is required, ſhall inſtead of an Oath in the uſual Form, be permitted, (except criminal Caſes Juries and Offices) to make a ſolemn Declaration and Affirmation, for the Form of which ſee *Title Anſwers, &c.* which Declaration, and Affirmation, ſhall have the Force of an Oath, and Perjury therein ſhall be puniſhed as in other Caſes. See alſo the *Stat.* 6 *Geo.* 1. *C.* 6. 9, *Geo.* 2. *Ch.* 16, and 19. *Geo.* 2. *C.* 18.

Quakers to affim only, not to ſwear.

When an Affidavit is neceſſary, and E. Contra.

IF a Bill be exhibited, grounded on the loſs of a Bond; as it is the Loſs which intitles the Court to the Juriſdiction of the Cauſe, Affidavit muſt be made of it. 1 *Cha. Ca.* 231.

Bill to be relieved on the loſs of a Deed, affidavit is to be made of the loſs of it.

But, if a Perſon comes only for bare Diſcovery of a Deed; he need not make Oath of the Loſs of it, as he muſt do when he comes for Relief, for he cannot tranſlate the Juriſdiction without Oath

But if the Bill be only for Diſcovery, there need not.

Oath made of the loſs of the Deed. 1 *Vern.* 247, 310. 1 *Cha. Ca.* 231. 2 *Williams* 541. *Sed* 1 *Vern.* 39. *Contra.* See *Bunb. Rep.* 46.

Ibidem.

So, where a Bill was brought for a bare diſcovery of a Deed, and the Defendant demurred, becauſe the Plaintiff had not made Oath, according to the Courſe of the Court, that he had not the Deed, upon which this Diſtinction was taken and allowed of by the Court; *viz.* that where a Perſon comes for a Diſcovery, and prays Relief, there it is neceſſary for him to make Affidavit of the Want of the Deed, but when he ſeeks but a bare Diſcovery, or to have it produced at a Trial, it is not neceſſary, for it is not to be preſumed that the Plaintiff in either of the latter Caſes would do ſo abſurd a thing, as exhibit a Bill if he had the Deed. 1 *Cha. Ca.* 11. 1 *Vern.* 180. *S. P. Preced. in Ch.* 536.

If the Bill prays Relief generally, ſuch Relief ſhall be applied to the loſs of the Deed only, and therefore no Affidavit neceſſary.

A Perſon filed a Bill for diſcovery of the Counterpart of a Leaſe, and therein charged that the Defendant had broke ſeveral of the Covenants in his Leaſe, but that for want of the Counterpart, the Plaintiff could not aſcertain his Damages, in an Action at Law to be brought concerning the ſame, and therefore pray'd a Diſcovery of this Counterpart, and general Relief. To this Bill, the Defendant demurred

murred to the Relief only, for that the Plaintiff had not annexed to his Bill the uſual Affidavit that he had not the Counterpart in his Cuſtody, and gave a full Anſwer by way of Diſcovery to the whole Bill; but the Demurrer was over-ruled; for, that the Bill was only for a Diſcovery, and therefore tho' he charged that ſeveral of the Covenants were broken, yet he did not pray any Recompence or Satisfaction for ſuch Breach, but only complained that for Want of the Counterpart, he could not aſcertain his Damages at Law for his Satisfaction; and though he prayed Relief generally, that was only to be applied to the particular Relief he had before prayed, which was a Diſcovery of the Counterpart of the Leaſe. *Trinity* 1729, between *Whitworth*, and *Goulding*. *Bac. Equ. Ca.* 14.

The Affidavit neceſſary to be filed on a Bill of diſcovery on the Popery Acts.

On a Bill of Diſcover on the Popery Acts, the Plaintiff muſt annex an Affidavit thereto, that he is a Proteſtant, and that he doth not file the Bill in Truſt for a Papiſt, or Perſon Profeſſing the Popiſh Religion.

Plea of Privilege of an Officer of the Court, muſt be upon Oath.

Where the Defendant pleaded the Privilege of the Exchequer, being the Foreign Appoſer, the Plea was over-ruled becauſe it was not upon Oath. Between *Gibſon*, and *Whiteacre*. 2 *Vern.* 83.

The Affidavit neceſſary on a Bill to perpetuate the Teſti-

If a Bill be brought to perpetuate the Teſtimony of Witneſſes, an Affidavit muſt

mony of Witneſſes.

muſt be annexed, that the Plaintiff's Witneſſes, are old and infirm and not likely to live long, whereby he is in Danger of loſing their Teſtimony. 1 *Peer Williams*, 117.

Plea of Privilege of an Univerſity, need not be on Oath.

A Plea of Privilege of an Univerſity need not be on Oath, but it is ſufficient to aver that the party is a Scholar reſident, *&c.* 26 *Cha.* 1ſt between *Pratt*, and *Taylor*. 1 *Cha. Ca.* 237. 258.

Nor a Plea of Outlawry, or Excommunication.

The Pleas of Outlawry or Excommunication need not be ſworn to, for if the Outlawry be pleaded, the Record or the Capias thereupon muſt be Pleaded *Sub pede Sigilli*, and it is generally annexed to the Plea; and a Matter of Record cannot receive greater ſtrength from the Oath of the Party, being itſelf the higheſt Evidence that can be produced. And when Excommunication is pleaded, it muſt be certified by the Ordinary, either by Letters Patent, containing a poſitive Affirmation that the Plaintiff ſtands excommunicated, and for what Crime, or by Letters Teſtimonial reciting *Quod ſcrutatis Regiſtris invenitur*, &c. either of them muſt be *Sub Sigillo* and annexed to the Defendant's Plea, and therefore being *Sub Sigillo* it need not be ſworn to; *Sed Quær.* 2 *Vern.* 87. where a Plea of Outlawry was diſallowed, becauſe

becauſe it was not put in upon Oath, *et E. Contra* 198.

A Plea of a former Suit depending for the ſame Matter need not be upon Oath. 1 *Vern.* 332.

Nor of a former Suit depending.

Where a Perſon is arreſted upon an Attachment, the Contempt ſhall hold good, tho' no Affidavit be filed at the Time of taking forth the Attachment, if it be filed before the Return of it. 1 *Vern.* 172.

Sufficient to file an Affidavit, before the Attachment is returned.

Altho' the Privilege of Peerage, allows a Peer to put in his Anſwer upon Honour only, yet it is reſtrained to an Anſwer; and, as to all Affidavits, or where a Peer is examined as a Witneſs on Interrogatories or otherwiſe, he muſt be upon his Oath. 1 *Peer Williams*, 147.

Peer of the Realm to put in his Anſwer to a Bill upon Honour but his Anſwer to Interrogatories, and Examination, as a Witneſs muſt be on Oath.

A Bill was *(inter alia)* to diſcover Deeds and Writings which belonged to the Plaintiff's Wife's Eſtate, the Defendant by Anſwer owned ſhe had ſeveral in her power, but did not ſet them forth; and on the Plaintiff's Motion ſhe was ordered to produce them on Oath. But on Application to the Court that Order was altered, and ſhe was ordered to produce them on Honour only, being in ſupplement of her Anſwer which was only on Honour, being a Peereſs. Duke *Hamilton* and *Ux.* againſt

A Peereſs ordered to produce Deeds, confeſſed in her Anſwer on Honour only, not on Oath.

againſt Lady *Gerrard. Preced.* in *Chan.* 92.

Bill to be relieved againſt a Deed fraudulently cancelled, there needeth no Affidavit of the loſs of it.

If a Bill is brought to be relieved againſt a Deed fraudulently cancelled by the Defendant, and to have another Deed executed; the Plaintiff need not make Oath of the loſs of the Deed, becauſe he could have no Remedy at Law. Though the Deed was in his Hands. See *Moſely's Rep.* 192.

Affidavit before Jnjunction againſt Rent.

By 5 *Geo.* 2. *Chap.* 4. *Pars*, on any Ejectment, Diſtreſs or Action for Rent, if the Tenant files a Bill for an Jnjunction it ſhall not Iſſue for Want of an Anſwer, unleſs the Plaintiff ſhall verify by Affidavit the material Allegations of his Bill.

Bill for an Jnjunction, to ſtop proceedings on a Decree, Affidavit to be made of the Facts.

Where a Bill is filed for an Jnjunction to ſtop proceedings on a Decree, an Affidavit is to be made by the Plaintiff at the Foot of the Bill, that the ſeveral Facts charged therein are true.

Conſent ſigned only by the Parties, Affidavit to be made of the perfection of them.

Where any Conſent in any Cauſe is ſigned by the Parties only, and not by their Attornies, it muſt appear to the Court by Affidavit, that the Perſons whoſe Names are ſubſcribed to the Conſent did ſign it, or the Court will not make any Rule to receive it.

3dly.

3dly. *Where an Affidavit may be ſaid to be full and ſufficient, and what ſhall be allowed thereon.*

On Affidavit of a Witneſs being beyond Seas, the Point to be mentioned to which he can materially depoſe.

DECLARED by my Lord Chancellor *Jefferies*, that a general Affidavit of having material Witneſſes beyond Sea ſhould not be ſufficient, but the Witneſſes muſt be named in the Affidavit, and the Point to which they can materially depoſe. 1 *Vern.* 334.

The Oath of the Party injured ſufficient in *Odium Spoliatoris.*

Some Bailiffs who had ſerved an Execution in Breach of an Injunction, find Money hid in the Houſe and carried it away, and the Party at whoſe Suit the Execution was taken out was ordered to make Satisfaction, who complained of this Order as unjuſt, ſaying that the Parties ſhould be admitted to purge themſelves by Oath; and that the Plaintiff ſhould not be admitted to judge of his own Damages, but my Lord Chancellor confirmed the Order, and ſaid that a Man who had ſtolen would not ſtick to forſwear it, and that therefore in *Odium Spoliatoris* the Oath of the Party injured ſhould be a good Charge on him who did the wrong. Between *Childrens* and *Saxby*, 25 *Car.* 2. 1 *Vern.* 207.

An Accountant on his Oath to be allowed Sums under 40*s.*

An Accountant ſhall be allowed Sums under forty Shillings on his own Affidavit. 1 *Vern.* 283. But for this, See Title *Account.*

Courts of Law will allow an Affidavit ſworn before a Conſul, to be read.

The Lord Chancellor allowed an Affidavit of the Bankrupt ſworn before a Maſter Extraordinary in *Corke* to be read; and declared he had known an Affidavit ſworn before one of our Conſuls abroad, allowed to be read by the Courts of Law. *Moſely's Rep.* 78.

Affidavit of the ſervice of Proceſs, what to contain.

It is neceſſary, that every Affidavit of the ſervice of Proceſs or Orders, do truly and fully prove a good Service: and, if the Plaintiff's Name, the Court, the return of the Writ, or any Thing material be omitted, no Attachment can be thereupon regularly iſſued for Want of an Appearance; for until a due ſervice be ſhewn, no Contempt appears to the Court.

In Affidavits of the ſervice of Proceſs, the Place of Service to be particularly mentioned.

And in all Affidavits of the ſervice of the Proceſs of this Court, (as has been ſaid before) the Place where it was ſerved, ſhould be particularly ſworn to; for otherwiſe, if the Perſon employed to ſerve the Proceſs ſhould ſwear falſly, the Defendant is deprived of the opportunity of convicting him of Perjury, by proving he was in another Place at the time the Service is ſworn to.

In an Affidavit of Notice, 'tis not enough to ſay that Notice was given, or the Copy delivered to the Party's Attorney in Court; but his Name muſt be alſo mentioned, that it may appear with Certainty: And it muſt ſay, *Notice in Writing*, or Words to that effect. And if he who ſerves the Notice, does not know that the Perſon on whom it is ſerved is the Party's Attorney in Court, he muſt ſay, *as he is credibly informed and verily believes*, firſt taking Care that he receives Information accordingly.

Affidavit of the ſervice of Notice, what to contain.

A Man may in his Affidavit ſay, that he hath read an Affidavit ſworn by another Perſon in the ſame Cauſe, and that he verily believes the ſeveral Facts therein contained are true in ſuch Manner as they are therein ſet forth, and need not repeat the Facts, but he muſt mention the Day on which ſuch Affidavit was ſworn, and the Perſon's Name who ſwore it.

Reference to the Affidavit of another Perſon.

Anſwer, Plea and Demurrer.

How the Defendant was to anſwer by the antient Civil Law.

BY the antient Civil Law, when the Plaintiff had put in his Poſitions before the Judge, the Defendant was to put in his Conteſtations or Negations of ſuch Poſitions, and then the Plaintiff had Liberty to examine the Defendant upon Interrogatories, to ſuperſede the Neceſſity of Proof, and theſe were called Articles, or the *Libellus Articulatus*, and was generally put in after the firſt Act, when the Defendant had anſwered the Poſitions.

The Difference in Courts of Equity.

But in Equity the Poſitions and the *Libellus Articulatus* are flung into one Bill; hence it is that the Interrogatories muſt ariſe out of the Facts alledged in the Bill, and if they do not, but are totally foreign, the Defendant may refer them for Impertinence.

The antient and preſent Method of taking the Defendant's Anſwer in Chancery.

In *Chancery* the Maſters at firſt examined the Defendant upon thoſe Interrogatories, but afterwards it was left to the Counſel or Commiſſioners in the Country; and hence it was, they ſent the Commiſſioners a Copy of the Bill which was called the Tenor thereof, that they might examine the Defendant upon the *Libellus Articulatus* as the Maſters were wont to examine the Defendant above upon the Ar-

Articles of the Bill itſelf; but afterwards the Maſters left that to the Counſel who draw the Anſwer, as the Court had left the Peruſal of the Bill to Counſel, for anciently the Court peruſed the Bill itſelf, to ſee whether the Petition was proper before it was filed; but the Court, by Multiplicity of Buſineſs, leaving the Peruſal of the Bill to the Honour of the Bar, the Maſters likewiſe left the Examination of the Defendant upon the Articles of the Bill to the Counſel; and Commiſſioners in the Country alſo left it to the Bar, although Counſel's Hand is not neceſſary to an Anſwer put in by Commiſſion, as it is to an Anſwer put in, in Court.

The Forms of the Beginning of the Anſwer and of the Oath, agree with the Civil Law.

The Anſwer begins in the Form of the Civil Law, *viz. Sub Proteſtatione de nimia Generalitate, Ineptitudine, Obſcuritate, Nullitate and indebita Specificatione dicti Libelli* (*Clark* 35.) And the Oath is in the ſame Manner, *de Scientia tua in his quæ proprium tuum decernunt, et de Credibilitate in alieno.*

The Time given the Defendant to anſwer by the Civil Law.

And by the antient Civil Law when the Libel was preferred to the Judge, it was alſo delivered to the Defendant or *Reus*; and if the Defendant did not anſwer in ten Days, they had the *Edictum Primum*, and after ten Days more if the Anſwer did not come in, they had the *Edictum Secundum*, and in ten Days more,

they had the *Edictum Peremptorium:* And if he did not come and anſwer in ten Days more, Judgment was pronounced upon him as if he was abſent; and theſe were called the ſeveral *Dilationes* that were given the Defendant to anſwer, but after the Provincial Judges were ſettled then came in the Code to a new Regulation, which was, that after the Defendant was cited, the Plaintiff was to give Caution to end his Suit in two Months, and then he was likewiſe to deliver a Copy of the Libel to the *Reus*, who ſubſcribed the Note of the Time when ſuch Libel was delivered, and then there was a Term of twenty Days given the Defendant, in which Time he was to put in his Anſwer; and if he did not, Sentence was given as if the Anſwer was put in; for they look upon the ſubſcribing the Time of receiving the Libel as a Submiſſion to conteſt within the twenty Days, and twenty Days was reckoned as a Time of Deliberation, whether he would yield to his Adverſary or contend in Judgment, and therefore if the Libel was delivered, and the Subſcription demanded, and the Actor proved this, and the twenty Days were out, then, the Defendant was preſumed to acquieſce. *De Judiciis, Lib.* 5. *Tit.* 1. *Law* 72. *Code L.* 3. *Tit.* 9. *Novel* 53. *Cap.* 3. For more of this Matter, See *Title Exceptions.*

By

The Time the Defendant hath to anſwer in this Court.

By our Practice, if a Man be ſubpœna'd to anſwer it is returnable at a Time certain in Term, or in the Sittings after Term, and the Defendant is of Courſe to appear in four ſitting Days after the Return of the *Subpœna*, and is to anſwer in four ſitting Days after ſuch Appearance, or the Plaintiff may iſſue an Attachment of courſe againſt him.

Time to anſwer, in what Caſes granted.

But if a Defendant finds he cannot put in his Anſwer within the ſaid four Days, the Court upon Motion of his Attorney, will, if the Appearance be of that Term, and the Time for anſwering not out, grant him ſome further reaſonable Time to anſwer, according to the Circumſtances; but if the Defendant ſeeks an extraordinary Time to anſwer, which is often the Caſe, as where the Defendant cannot anſwer, without Sight of Writings which are in the Country, *&c.* or if the Bill be for an Account of Goods that are in the Country, and he in Dublin, ſo that he cannot ſet forth the Particulars without Sight; in theſe, and many other ſingular Caſes, the Court on Motion of Counſel upon an Affidavit of the Facts, and proper Notice given, will grant ſuch Time to anſwer as is reaſonable; but this ought only to be, where the Defendant incurs not any Diſpleaſure of the Court, but appears regularly at the Return of the *Subpœna*.

RULE. Rule for Proceſs on Time given to anſwer.

But in Trinity 1725, the Court were determined not to give any Time to the Defendant to anſwer, unleſs he would conſent to give a Rule for Proceſs.

And ſuch Proceſs to be *tunc pro nunc* and the Meaning thereof.

And ſuch Proceſs is to be *tunc pro nunc*, that is, if the Defendant's Anſwer be not filed at the Time given him by the Court to anſwer, that then, the Plaintiff ſhall be as forward with his Proceſs of Contempt, and in the ſame Condition, as if the Defendant had not obtained Time to anſwer, and that the Plaintiff had proceeded on the Contempts when the Defendant's firſt Time for anſwering was expired. *See Title Proceſs of Contempt.*

When the Defendant is entitled to a *Dedimus*.

If the Defendant lives twenty Miles or upwards from *Dublin*, he is intitled to a *Dedimus*, which the Court will grant upon an Attorney's Motion.

The beſt Way is to move for Time to anſwer, till the firſt Day of the enſuing Term, where the Defendant lives a Diſtance from *Dublin*, and why.

But if the Defendant's Appearance be towards the Cloſe of Term, and he lives any Diſtance from the City of *Dublin*, the beſt Way is, for the Defendant's Attorney, to move for Time to anſwer, until the firſt Day of the enſuing Term, and the Court will grant it, or perhaps to the ſecond Return of the Term, and then the Defendant may anſwer either by Commiſſion, or before a Baron at the Aſſizes, or in Town, at his Election; and the Plaintiff cannot enter Proceſs for want

want of the Anſwer, until after the firſt Day of Term; whereas if he prays a *Dedimus*, it muſt of Courſe, be returnable on the eſſoin Day of the enſuing Term.

If the Defendant intends anſwering before a Baron at the Aſſizes, he is to give the Plaintiff's Attorney Notice thereof.

But note, if the Defendant intends anſwering before a Baron at the Aſſizes, and that he is required by the Bill to view any Deeds or Writings before he anſwers, in ſuch Caſe, his Attorney is to give Notice to the Plaintiff's Attorney, ſome convenient Time before the Aſſizes, that the Defendant intends to anſwer before a Baron there, to the end that the Plaintiff may lodge the Deeds, *&c.* with the Baron's Clerk, or otherwiſe the Anſwer will be ſhort.

Of anſwering by Commiſſion, and alſo, of pleading or demurring.

RULE 16. *Dedimus Poteſtatem* to take an Anſwer.

BY the 16th general Rule, a Defendant may have a *Dedimus Poteſtatem*, to take his Anſwer, or a further Anſwer, by entering his Appearance, and taking out an Order of Courſe, if he lives twenty Miles from *Dublin*, or upwards, but not for a third Anſwer, unleſs upon good Cauſe ſhown to the Court, and upon taking out ſuch *Dedimus*, after the Defendant hath left his Commiſſioners Names in the Office, and hath ſerved a Copy thereof upon the Plaintiff or his Attorney, if the Plaintiff will not join in four Days, the Defendant's Attorney

Commiſſion *Ex Parte* on Plaintiff's Default in returning Names.

ney may repair to the Office, and take out a *Dedimus Poteſtatem* to be directed unto two of the Defendant's Commiſſioners, and * two more to be named by the Chief Remembrancer for the Plaintiff; but in Caſe of Commiſſioners, to examine eight Days are required.

The Officer gives Notice to the oppoſite Attorney, before he iſſues a Commiſſion *Ex Parte*.

Note, before the Officer ſtrikes the Names of Commiſſioners, and iſſues a Commiſſion *Ex Parte* either to take an Anſwer or examine Witneſſes, he firſt gives Notice thereof (uſually twenty-four Hours) to the Attorney for the Party making Default.

The Method of ſettling the Names of Commiſſioners, to take Anſwers is thus.

The Method of ſetling Commiſſioners Names, to take Anſwers.

The Defendant's Attorney is to leave a Note in Writing in the proper Office, of the four Commiſſioners named by the Defendant, with their Chriſtian and Surnames, Additions, and Places of Abode, and the Place where the Commiſſion is to be executed; then he muſt ſerve the Plaintiff's Attorney with a Notice of ſuch Commiſſioners Names being left in the Office, deſiring him to return the Names of his in the proper Time; then the Plaintiff's Attorney generally ſtrikes out two

* The Commiſſioners Names for the Plaintiff are furniſhed to the Officer, by the Defendant, or his Attorney.

two of the Defendant's Commiſſioners and returns the remaining two with the Names of four Commiſſioners, with their Additions and Places of Abode as aforeſaid for the Plaintiff, out of which the Defendant alſo ſtrikes two. And the four Commiſſioners which are thus ſettled by both Parties are to be inſerted in the Commiſſion to take the Defendant's Anſwer.

Deeds, *&c.* required by Anſwer to be viewed.

By a Rule made the 6th of *December*, 1701, it was ordered, that, in all Caſes, where Deeds or Papers are to be viewed by the Defendant, and that a *Dedimus* iſſues to take his Anſwer, they are to be lodged by the Plaintiff in the Hands of his Commiſſioners of courſe, otherwiſe the Anſwer to be deemed full.

RULE, 17. *Dedimus* to be taken out in eight Days after Rule entered or Attachment.

By the 17th. General Rule, when an Order for a *Dedimus* is entered, if it be not taken out in eight Days after entering the Rule, then an Attachment to iſſue of courſe, and if the Anſwer be not returned in four Days after the Return of ſuch *Dedimus*, or in caſe the Defendant ſhould procure further Time to anſwer, the Plaintiff to be as forward with his Proceſs of Contempt, as he might have been, if the Defendant had not taken out any *Dedimus*, or obtained ſuch further Time; and where a *Dedimus* is prayed to take an Anſwer in the Country, or beyond Seas, an Injunction will be

Injunction on a *Dedimus*.

be granted, by taking out an Order of courſe to ſtay the Defendant's Suit at Law (if any be) until the Anſwer comes in.

Injunction on a *Dedimus*, and in what Caſes granted, and when refuſed.

The general Rule is, that if the Defendant prays a *Dedimus*, the Plaintiff ſhall enter a Rule of courſe for an Injunction; but in ſome ſpecial Caſes, the Court have granted the Defendant a *Dedimus* without an Injunction, as where a Bill is brought againſt a Suit at Law, and the Plaintiff at Law is ready for a Trial before the Bill filed, or Injunction prayed; in that Caſe, the Court will not grant an Injunction but after Verdict.

Ibidem.

In the Caſe of *Hoonahan* againſt Lord *Orrery* in this Court, the Plaintiff filed a Bill, got an Injunction on the prayer of the *Dedimus* into *England*, and in coming in of the Anſwer, the Injunction was diſſolved; the Plaintiff then amended his Bill, and the Defendant's time for anſwering the amended Bill being out, the Defendant had leave to anſwer by *Dedimus*, without an Injunction.

RULE 41. What Plea ſhall be received by *Dedimus* and what not.

That, by the 41ſt general Rule, no Demurrer to the whole Bill, nor any Plea to the juriſdicton of the Court, or diſability of the Perſon, ſhall be received by *Dedimus*; nor any Plea, or Demurrer, at all admitted, where the Defendant ſtands in Contempt to a Commiſſion of Rebellion, without ſpecial Order of the Court;

No Plea or Demurrer to be received, if Defen-

Court; and all Pleas (except Matters of Record) are to be ſworn, except in the King's Attorney's caſe, who anſwereth a Bill againſt the King, or a Corporation, who are ſued by the Name of their Corporation, and anſwer without Oath under the Seal of their Corporation.

dant be in contempt to a Commiſſion of Rebellion, without ſpecial Order.

What Plea ſhall be ſworn to, and what not.

By a Rule made the 8th of *May* 1719, wherever a Defendant ſhall pray Time to Anſwer, he ſhall not demur alone, but ſhall return an Anſwer with the Demurrer. Therefore, *Quær.* is it not the beſt way to pray for Time to anſwer, plead, or demur?

Demurrer alone, not to be returned when time for anſwering it prayed.

As to Pleas in Bar called peremptory Exceptions, which Bar will exclude the Action forever, as a Plea of a Releaſe, or of a Purchaſer for valuable conſideration without Notice (but Notice muſt be denied) the Court ſeldom or never deprive the Party of the Benefit of them, though he run into Contempt. But in Caſes of Pleas of Abatement, which are but dilatory, and temporary Bars, the Court do not uſually admit them to be received, if the Defendant runs into contempt.

Pleas in Bar received, tho' Defendant be in Contempt, but not Pleas in Abatement.

When a Commiſſion iſſues to take the Defendant's Anſwer in the Country, four Days Notice muſt be given of the Execution thereof to the Plaintiff, or his Commiſſioners, excluſive of the Day of Service of the Notice, and the Day of opening the Commiſſion, unleſs a ſhorter Time

The Proceedings on taking an Anſwer by Commiſſion.

Time be appointed by order of Court; and in ſuch Notice, the Time when, and Place where, ſuch Commiſſion is to be ſped, is to be particularly ſpecified.

The Form of the Notice to be given of ſpeeding the Commiſſion.

Notice of Speeding Commiſſion.

" We whoſe Names are hereunto ſubſcribed having received a Commiſſion " iſſuing out of the *Chancery* ſide of the " *Exchequer* in *Ireland* to take the Anſwer of *C. D.* Defendant to the Bill " of Complaint of *A. B.* Complainant, " do hereby give you Notice that we " intend to execute the ſaid Commiſſion " on ——— the ——— Day of ———, " at or about the Hour of ten of the " Clock in the forenoon of the ſaid Day, " at the Houſe of *O. P.* at the ſign of " ———in the Town of ———, in " the County of ———, at which " Time, and Place, you with your Com- " miſſioners may be preſent if you think " proper. Given under our Hands the " ——— Day of ———".

This Notice is to be ſigned by the Commiſſioners named by the Defendant; and to be directed thus; *To the Plaintiff*, or to *C. D.* and *E. F.* the Commiſſioners named by the Plaintiff.

The Duty of the Commiſſioners.

The Defendant's Anſwer when taken is to be ingroſſed on Parchment, and when

when the Defendant hath read it, or that the ſame is read to him by one of the Commiſſioners (in caſe he cannot read) he is to ſign it; and then one of the Commiſſioners is to ſwear the Defendant, and when he is ſworn, is to aſk him, if he hath read the Anſwer, or if he hath heard it read to him, if the Anſwer he then gives is in all points true according as he gives the ſame, and as the ſame is ſet forth in the preſent Writing, and if the Name, or Mark, ſubſcribed thereto, is the Defendant's Hand-writing or Mark. But note, where another Perſon not one of the Commiſſioners, reads the Anſwer to a Defendant who cannot read, he ſhould be ſworn that he has read it truly.

The Defendant's Oath.

How it is to be, if Defendant cannot read.

The Anſwer being ingroſſed, is to be annexed to the Commiſſion, as are alſo the Schedules, if there be any, and then the Caption is to be made at the foot of the Anſwer thus.

"Taken and ſworn before us at —— in the County of —— by virtue of the annexed Commiſſion, this —— Day of ——".

The Caption.

To this, the Commiſſioners ſign their Names.

Note, the Caption is to be properly varied according to what is taken.

And

And the Caption being made, and ſubſcribed in this manner, the Commiſſion is to be indorſed about the middle thus.

The Indorſement on the Commiſſion.

" The Execution of this Commiſſion
" appears in a certain Schedule (or
" certain Schedules if more than one
" ſkin) hereunto annexed."

And underneath the Commiſſioners are to ſign their Names.

The method of making up the Commiſſion, ſending it to *Dublin*, and of delivering it there.

When an Anſwer is thus taken by Commiſſion in the Country, the Commiſſion with the Anſwer ingroſſed on Parchment, are to be wrapped up and incloſed in a Paper Cover, which is to be ſealed by all the Commiſſioners who were preſent at the taking the Anſwer; and is to be delivered by the Commiſſioners, or one of them, to ſome Perſon who will bring it to *Dublin*, and ſwear before one of the Barons, that the ſame was neither opened or altered ſince he received it from the Hands of the Commiſſioners, or one of them, as the Caſe is.

No Oath to be taken by a Commiſſioner if he brings it to town.

But if the Commiſſion is carried by one of the Commiſſioners, no Affidavit is required, and you need only indorſe.

But it muſt be ſo indorſed.

" 25th Day of *March* 1747, re-
" ceived by the Hands of *G. H.*
" one of the Commiſſioners.

And

And when the Commission, with the ingrossed Answer, is made up, and sealed as aforesaid, the Cover is to be thus directed.

To the Right Honourable the Chancellor, Treasurer, Lord Chief Baron, and the rest of the Barons of his Majesty's Court of Exchequer *in* Ireland. The Direction.

And the Wrapper is to be thus indorsed.

A. B. Plaintiff, *C. D.* Defendant. } *The Answer of the Defendant* C. D. *taken at the House of* ——, *in the Town of* ——, *in the County of* ——, *the* —— *Day of* ——, *by Virtue of a Commission, issued under the Seal of his Majesty's Court of* Exchequer *in* Ireland, *for taking the Defendant's Answer in this Cause.* The Indorsement on the Wrapper.

The Defendant hath four Sitting-days, after the Return-day, mentioned in the Commission, to file the Answer; and until these four Days (*Quarto die post*) are passed, Process of Contempt cannot be entered. Contempts not to be entered until four Days after Return of *Ordinar.*

By a Rule made in this Court, the 18th of *February*, 1744. Whereas by the Course of the Court, after the Return of Commissions, for taking of Defendant's Answers, four Days are allowed for filing No further Time to be given without special Reason.

the ſame: Now it is this Day ordered by the Court, that no further Time for filing the Anſwer, ſhall in any Caſe be granted, without ſpecial Reaſon, aſſigned by Affidavit.

When *Dedimus* is returned, four Days given to copy the Anſwer.

And yet when an Anſwer hath been returned by *Dedimus*, the Court have ſometimes upon Motion of the Defendant's Attorney, given him four Days Time to take a Copy of the Anſwer, but of late they have refuſed it.

Any two of the Commiſſioners may execute it.

Although there be four Commiſſioners generally named in every *Dedimus Poteſtatem* to take a Defendant's Anſwer, yet if any two of them only ſhall meet at the Place appointed for executing the Commiſſion, they may proceed; for the Writ is directed to any two or more of them.

No Notice on a Commiſſion *Ex Parte*.

On a Commiſſion *Ex Parte*, no Notice is required.

Commiſſions to take Anſwers in *England*, and the Proceedings thereupon.

Commiſſions to take Anſwers in *England*, are always returnable, *ſine dilatione*, and not at a Day certain, as in Commiſſions to take Anſwers in this Kingdom; therefore before Proceſs of Contempt can be entered againſt the Defendant, for not returning ſuch Commiſſion to *England*, the Plaintiff's Counſel * is to move the Court, that the Defendant do return

* Of late this Motion has been often made by Attornies, and allowed by the Court.

return the Commiſſion by a certain Day after Service of the Order, or that the Plaintiff may be at Liberty to enter Proceſs; for until this Rule is made, the Commiſſion had no Return: But Note, this Rule will not be granted, until the Defendant hath lapſed a Vacation, and the ſhort Vacation after *Eaſter* Term is not accounted one.

And if the Commiſſion be not returned by the Time prefixed by the Rule, then the Plaintiff's Attorney moves for Liberty to enter the Proceſs, and then he may go on with them, but if he omit the Rule to aſcertain the Return, the Proceſs will be irregular: So determined upon full Debate, in the Caſe of *Vernon* againſt *Benſon*, in this Court, 4th *July*, 1743. Ibidem.

The Plaintiff's Commiſſioners may refuſe to execute the Commiſſion, unleſs they may read the Anſwer. 2 *Har. Chan. Pract.* 2d Edit. 417. Plaintiff's Commiſſioners may inſiſt on reading the Anſwer.

Some Rules concerning Anſwers in general.

AN Anſwer, in general, muſt confeſs, or avoid, or traverſe, or deny, the material Parts of the Bill; it muſt contain nothing ſcandalous or impertinent; it muſt be engroſſed on Parchment, and ſigned by Counſel, unleſs it Anſwer in general, how to be prepared, and the Requiſites on filing the Anſwer.

is taken by Commiſſion in the Country, and then it may be ſworn and filed without Counſel's Hand thereto; it is to be ſigned by the Defendant, and by his Attorney in all Caſes, and is to be upon Oath, except in the Caſe of Peers, *&c.* whoſe anſwers are always taken upon Proteſtation of Honour.

Conſent to receive Anſwer without ſigning or without Oath.

Every Anſwer is to be ſigned by the Defendant, for the more eaſy convicting him, if guilty of Perjury, and is to be upon Oath, unleſs the Plaintiff ſhall by Conſent diſpenſe therewith; and this Conſent is to be ſubſcribed at the Foot of the Anſwer, and upon Motion of the Defendant's Attorney thereon, the Court will grant an Order to receive the Anſwer, without ſigning, or without Oath, as the Caſe is.

RULE 23. Anſwer to a Matter charged as Defendant's own Fact, how to be.

By the 23d general Rule, an Anſwer to the Matter charged, as the Defendant's own Fact ought regularly to be poſitive, without ſaying it is to his Remembrance, or as he believeth, if ſaid to be done within ſeven Years before the preferring of the Bill, unleſs the Court upon Exceptions taken, and ſpecial Cauſe ſhewn, ſhall diſpenſe with ſo poſitive an Anſwer; and if the Defendant confeſſes not the Fact, he muſt traverſe or deny it poſitively, and directly, and not by Way of Negative Pregnant; and if the Fact be laid with Circumſtances, the Defendant

Negative Pregnant.

Defendant muſt not anſwer it literally only, as it is laid in the Bill, but muſt anſwer the Point in Subſtance poſitively, or certainly.

But a Defendant is not obliged to anſwer, ſo as to ſubject himſelf to any Forfeiture, or Penalty at Law thereby, but may inſiſt thereon by Anſwer, Plea, or Demurrer, as he ſhall be adviſed. *Sed vide Poſt. Bills of Diſcovery on the Popery Acts.*

Defendant not obliged to anſwer, ſo as to ſubject himſelf to any Forfeiture, or Penalty at Law.

As to the Fact of another, which the Defendant doth not certainly know, he ought to ſay *he hath heard and believes it to be true*, or that he doth not believe, *&c.* and ought not to ſay only *that he hath heard.*

How a Defendant is to Anſwer as to the Fact of another.

Obſerve that no Anſwer is ſtrictly reputed ſuch, until filed, nor to be filed, until a Copy of the Bill be taken out, and atteſted by the Officer; * nor will it be deemed to be filed, until the Contempts (if any) be purged, that is, until the Coſts of the Proceſs of Contempt for not anſwering are paid; and if they be not paid, the Plaintiff's Attorney may, on Motion, obtain an Order for Liberty to proſecute the Contempt, notwithſtanding any Anſwer alledged to have been filed, unleſs the Coſts of the Proceſs, and of the ſaid Order, be paid in four Days after Service thereof.

Anſwer not deem'd filed, until a Copy of the Bill taken out and Contempts purged.

* By the 24th Rule, *pars.* *See Title Exceptions.*

If the Defendant tenders the Coſt, and the Plaintiff refuſes it, he is to move to lodge it with the Chief Remembrancer.

If the Defendant tender the Plaintiff the Coſts of the Contempts, and he refuſes to receive them, but ſtill goes on with further Proceſs, the Defendant's Attorney is then to move the Court for Liberty to lodge the Coſt with the Chief Remembrancer, otherwiſe the Proceſs will be regular.

Anſwer amended.

A Defendant may, without Notice, move to amend his Anſwer in a ſmall Matter, but if it be in a material Point, he muſt give Notice; and the Court ſometimes grants it even after Iſſue joined, eſpecially upon an Affidavit that the Defendant was ſurprized therein, and on payment of Coſts. 1 *Ch. Ca.* 29. *Bac. Eq. Ca.* 29.

Anſwer not to be altered after it is ſworn, without leave of the Court.

In the Caſe of *Blake* and *Lynch*, in this Court, the Defendant anſwered and demurred by *Dedimus*, the Return of the Anſwer was ſworn, and it was left with the Attorney; he obſerving ſome informality in the Anſwer and Demurrer, the Defendant came to Town and ſwore another Anſwer and Demurrer, and filed the laſt; upon this Matter the Court ordered, that the Anſwer and Demurrer, firſt ſworn, ſhould be filed, and deemed as firſt filed, and would have attached the Attorney, had he not juſtified himſelf, by making it appear he had tendered the firſt Anſwer to the Officer, who

who refuſed to receive it, being obliterated, and in ſome Places illegible.

Anſwer amended, after Hearing, and after a Decree.

In the Caſe of the Counteſs of *Gainborough* againſt *Giffard*, 2d. *Williams*, 427, after a Hearing and Decree againſt the Defendant, upon very full Affidavits, by the Perſon who ingroſſed it, and the foul Draft being produced, upon ſolemn Debate before the Lord Chancellor, aſſiſted by the Maſter of the Rolls, the Court gave the Defendant leave to amend the Anſwer, and to ſwear it over again, tho' no Precedent could be ſhewn that it was ever done after the Cauſe heard, and this Matter had been before denied on a Petition and on a Motion.

No ſettled Rule for amending of Anſwers.

But obſerve that there are no ſettled Rules for amending of Anſwers, but it is diſcretionary in the Court. See the Caſe of Lady *Howth* againſt *Howard*, and others in *Chancery*, *Eaſter* Term 1755, where the Court gave leave to rectify a Miſtake in the Defendant *Howard*'s Anſwer; but in this Caſe the Defendant *Howard* was no way intereſted, and the Bill againſt him was meerly for Diſcovery; beſides it did not appear that the Plaintiff could be prejudiced.——— See *Bunbury's Rep.* 186. 248. 295. 323. ſeveral Caſes, where Anſwers have been amended, and where refuſed.

Anſwer taken off the File to convict one of Perjury.

When the Court ſhall order an Anſwer to be taken off the File, to have the Party convicted upon, it is to be delivered to the Clerk of the *Niſi prius*, for which he is to give a Receipt; but this Motion is not uſually granted until a Bill of Indictment is found.

Of reading Anſwers on Trials at Law.

In the caſe of *Lyneh* and *Kirwan*, on a leading Order, Lord Chief Baron *Gilbert* declared, that if at Law, the Plaintiff makes uſe of an Anſwer, it may be all read through, and ſhall be Evidence as well for the Defendant as for the Plaintiff, but not concluſive Evidence for the Defendant.

Peers, &c. to anſwer upon Honour.

Lords of Parliament, as alſo the Widows and Dowagers of Temporal Lords, ſhall anſwer upon Proteſtation of Honour only.

Corporations under their Seals.

The Anſwer of a Corporation, is taken under their common Seal.

Infant to anſwer by Guardian.

A Minor or Infant, under the Age of twenty one Years, is to anſwer by his Guardian; and if there be not a Guardian appointed by Will, or by the Court of *Chancery*, a Petition is to be preferred to the Court, to appoint a Guardian for the Minor to appear and anſwer; in which Petition it is to be ſet forth, that a Bill is filed againſt the Defendant, and that the Defendant is an Infant, and the Petition is to be ſigned by

by an Attorney of the Court only; but the Father of the Infant, or the Mother, if the Father be dead, may be appointed Guardian, to appear and anſwer for the Infant upon an Attorney's Motion only, without a Petition, as they are deemed and accounted Guardians by Nature to their Children; and if the Father or Mother of the Infant be living, the Court will not ordinarily appoint a Stranger as Guardian, unleſs they be Plaintiffs; and where Application is made to appoint any other Perſon Guardian, it ſhould regularly appear by the Petition, that the Father and Mother of the Infant are either dead, or that they are Plaintiffs in the Cauſe.

The Anſwer of a Quaker is taken upon his ſolemn Affirmation and Declaration. See *Stat.* 19 *Geo.* 2. ch. 18.

A Quaker's Affirmation.

Quaker's Affirmation.

" I the Defendant *D. H.* do hereby " ſolemnly, ſincerely and truly declare " and affirm, that I am, and have been " for one whole Year laſt paſt, of the " Profeſſion of the People called Quakers; and do further ſincerely, and " ſolemnly declare, that I am perſuaded " in my Conſcience, that the taking of " an Oath in any Caſe whatſoever is " contrary to the Law of God, contained in the New Teſtament, and being " thoroughly convinced thereof, I do

" further

" further ſincerely and ſolemnly declare " and affirm, that the Anſwer I here " give is in all Points true, according as " I give the ſame, and as the ſame is " ſet forth in this preſent Writing to " which I have ſubſcribed my Name, this " ——— Day of———

" Affirmed before me the——— " Day of———

" *I. B.*"

" *G. E. H.* Attorney for the " Defendant, who was pre- " ſent, and ſaw him ſign his " Affirmation."

See the Statutes 6 *Geo.* 1. ch. 6. 1 *Geo.* 2. ch. 5. 9 *Geo.* 2. ch. 16, and 19 *Geo.* 2. ch. 18. relating to Quakers.

A Jew ſworn on the Pentateuch.

A Jew being to put in an Anſwer, it was ordered he ſhould be ſworn upon the Pentateuch in preſence of the Plaintiff's Clerk. 1 *Vern.* 263.

A *Feme Covert* regularly not to Anſwer, without her Huſband, without leave of the Court.

A married Woman cannot regularly put in an Anſwer without her Huſband, but by ſpecial Leave of the Court, on due Notice given, and an Order for that purpoſe. *M. S. Rep. Hill.* 4 *Geo.* 2. *Abergaveny* and *Abergaveny*, *Viner's Abrid. Tit.* Baron and Feme (*I. a.*) *Ca.* 20.

But has ſometimes been allowed of without any Order to warrant it.

But in the Caſe of the Duke of *Chandos* againſt *Talbot* and *Ux.* 2 *Williams*, 372. a *Feme Covert*'s ſeparate Anſwer was put in without an Order to warrant it,

it, and it being referred to a Maſter to ſtate whether her Anſwer was regularly put in or not, and he having reported that the Anſwer was put in by the Wife deliberately by good Advice, that ſhe was fully apprized thereof, conſented thereto, and that it was done at her Requeſt, with the Conſent of her Huſband, and that the Plaintiff had accepted of it, and replied to the ſame, therefore the *Feme Covert*, or any other on her Behalf, could not aſſign that which was done in her Favour, as an Irregularity; wherefore King Chancellor, and the Maſter of the Rolls, reſolved, that the Anſwer was regularly put in, and over-ruled the Exceptions to the Maſter's Report. *Ca. in Equity Abr.* 145.

Feme Covert's Anſwer, in her Huſband's Abſence, to be by Guardian, unleſs in Caſe of neceſſity.

And in *Bunbury's Reports*, 167, it is ſaid, that regularly a *Feme Covert*, in the abſence of her Huſband, muſt anſwer by her Guardian (that there may be ſome Body anſwerable for the Coſts,) yet in the Caſe of *Clover*, and others, againſt *Eliz. Young*, upon an Affidavit made that her Huſband, ſince he entered his Appearance, had run away, and could not be found; that ſhe had applied to all her Friends and Acquaintance to be her Guardian; but that all had refuſed, becauſe ſhe could not give Security to indemnify them againſt the Coſts, in this Caſe of Neceſſity, the Court gave Leave to file her Anſwer without a Guardian.

If

Wife to Anſwer apart, if the Huſband would compel, or awe her.

If a Huſband ſhould uſe any coercive Means to compel or awe his Wife in the anſwering of a Bill, the Court, on ſpecial Application, upon an Affidavit of this Matter, will make an Order for her anſwering apart. It was ſo ordered in the Caſe of *Proby* againſt *Hamilton* and his Wife and others, in the Court of *Chancery*, *Hillary* Term, 1740. And Note, in this Caſe, the Defendant anſwered without a Guardian, but the Plaintiff did not object to it.

The Defendant need not view, indorſe, or ſet forth, any Thing relating to any Exhibit not mentioned in the Bill.

In Anſwers to Bills in Equity, the Defendant need not view, indorſe, or ſet forth any Thing in his Anſwer, relating to any Vouchers, Papers, or Exhibits, produced by the Plaintiff, his Attorney, or Commiſſioners, but what are particularly mentioned in the Bill.

Some ſpecial Caſes relating to Anſwers.

Defendant to have the Benefit of the Statute of Limitations, if inſiſted on in his Anſwer, tho' not pleaded.

WHERE a Defendant inſiſts upon the Statute of Limitations, by way of Anſwer, he ſhall at the Hearing have the like Benefit of the Statute, as if he had pleaded it. 2 *Williams*, 145.

On Exceptions to a Maſter's Report, the Exceptant to ſhew ſpecially the Matter excepted to.

If the Plaintiff refers the Anſwer for Scandal and Impertinence, and the Maſter finds the Anſwer neither ſcandalous or

or impertinent, the Plaintiff, on excepting to the Maſter's Report, muſt in his Exceptions ſhew, wherein, in what Line, or Page, and how far, the Anſwer is ſcandalous or impertinent, in Order, that ſuch Part of the ſaid Anſwer may be expunged by the Maſter; and it is not ſufficient in the Exceptions to ſay, in general, that the Anſwer is ſcandalous and impertinent. 2 *Williams*, 181.

It ſeems to be a ſtronger Caſe, where Exceptions are taken to an Anſwer for inſufficiency, and the Maſter reports it ſufficient, that the Plaintiff, in his Exceptions to the Maſter's Report, do ſhew wherein the Anſwer is inſufficient. *Ibidem.* Ibidem.

Alſo, if a Bill or Anſwer be referred for Scandal, and reported by the Maſter, to be ſcandalous, if the Maſter has once expunged this Scandal, the Party cannot then except to the Report, becauſe when the Scandal is expunged, it cannot then appear, by the Record, what that Scandal was, and it was the Party's own Fault, that he did not except to the Report ſooner. *Ibidem*, 182. No Exceptions to the Report, after the Scandal is expunged.

The Courſe of Courts of Equity formerly, was to refer Bills for Scandal after Anſwer, nay ſometimes after Hearing; but this was altered by Lord Chancellor *King*, as occaſioning great Delays; beſides If after a Defendant has anſwered a Bill, he can refer it for Scandal or Impertinence.

beſides, in the Reaſon of the Thing, it ought not to be; for when the Defendant has ſubmitted to anſwer the Bill, why ſhould he after that procure the Bill to be altered, and by that Means to be a new Bill? And his Lordſhip deſired it to be obſerved, as a Rule for the future, not to refer a Bill for Scandal, after the Defendant had ſubmitted to anſwer it. The Rule is the ſame as to referring for Impertinence. 2 *Williams*, 312, 313. *Sed Vide Title Pleadings, e contra*, if the Imputation of Scandal be not proved.

Infant, when he comes of Age, may amend his Anſwer or put in a new one.

Where a Decree is againſt an Infant, with a *Niſi Cauſa* in ſix Months after he comes of Age, he may, on Counſel's Motion, obtain Liberty to amend his Anſwer, or to put in a new Anſwer, and thereby ſet forth his Right. 2 *Williams*, 402.

On Time given to Anſwer Defendant may plead, but not demur.

On Time given to anſwer the Plaintiff's Bill, the Defendant may plead to it; for a Plea is an Anſwer, and is upon Oath as well as an Anſwer; but a Demurrer after Time given to anſwer would be irregular. 2 *Williams*, 464.

Bill ſhall not be taken *pro Confeſſo*, tho' the Anſwer be inſufficient, and tho' after a Sequeſtration.

If Time be given a Defendant to anſwer, and he accordingly anſwers, tho' after a Sequeſtration hath iſſued, and an Order obtained to ſet down the Cauſe to the intent the Bill may be taken *pro Con-*

Confeſſo, and though the Anſwer be reported inſufficient, yet the Bill ſhall not be taken *pro Confeſſo*. 2 *Williams* 556. *Hawkins* againſt *Crook*.

A Plaintiff was obliged to accept an Anſwer from *Tripoli*, which had been ignorantly opened on Shipboard. *Moſeley's Reports*, 59.

Plaintiff obliged to accept an Anſwer opened on Shipboard.

If an Iſſue is directed, and the Defendant's Anſwer is not falſified, or by one Witneſs only, the Court often orders it to be read as Evidence on the Trial. 2 *Cha. Ca.* 8. 3 *Ca.* 123. 2 *Vern.* 555. *Moſeley's Reports*, 184.

Defendant's Anſwer read on the Trial of an Iſſue at Law.

An Anſwer in Equity, put in by a *Feme Covert*, has been adjudged equal to a Fine. *Moſeley's Reports*, 284.

Anſwer of a *Feme Covert* equal to a Fine.

The Wife's Anſwer not prejudicial to the Huſband, where he denied the Truſt, and ſhe confeſſed it; and though one Witneſs proved it, yet the Bill was diſmiſſed. 2 *Cha. Ca.* 39.

The Wife's Anſwer not to prejudice the Huſband.

When the Bill is in the Disjunctive, the Defendant may take it either way. 1 *Vern.* 220.

Bill in the Diſjunctive, Defendant may Anſwer either way.

It is a Rule in Equity that the Anſwer over-rules the Plea, where the Defendant anſwers for the ſame Thing he inſiſts on by his Plea; for he ought not to aver it.

Defendant by Anſwer to the ſame Matter, to which he pleads, over-rules the Plea.

Earl

Earl of *Clanrickard* againſt *Buck*, *Jan.* 1717. 2 *Har. Ch. Pract.* 418.

Defendant muſt anſwer a particular Queſtion particularly, though he has anſwered it generally.

If a Man gives a general Anſwer, and a particular Queſtion be aſked, which is anſwered in the general Anſwer, yet he muſt anſwer particularly. 1 *Har. Ch. Pract.* 3d Edit. 359.

What ſhall be a full and ſufficient Anſwer.

When the general Traverſe is omitted at the end of the Anſwer; yet the Anſwer is good, and not to be ſuppreſſed as improper.

IT was moved to ſuppreſs an Anſwer as irregular and improper in regard it wanted the general Traverſe at the End, *viz. Without that, that any other Matter in the Bill contained, &c. is true*, and it was objected, that without the Traverſe there was no Iſſue joined. *Sed Cur. Contra*, it does not appear, but that, in the principal Caſe, the whole Bill, and and every Clauſe in it, is fully anſwered, and then the adding the general Traverſe is rather impertinent than otherwiſe; and if Iſſue is taken upon this general Traverſe, it is a denial only of every other Thing not anſwered by the Anſwer; and Lord Chancellor ſaid, that this general Traverſe ſeemed to him to have obtained formerly, and in ancient Times, when the Defendant uſed only to ſet forth his Caſe in the Anſwer, without anſwering every Clauſe in the Bill, and for that Reaſon it was the Practice for the Defendant to add, at the End of the Anſwer,

ſwer this general Traverſe. 2 *Williams Rep.* 87.

That he received no more to his Remembrance, ſufficient.

On Exceptions to an Anſwer, the Defendant having ſworn he received no more than the Sum of £.——— to his Remembrance, it was allowed to be a good Anſwer. Between *Hall* and *Bodily*, 1 *Vern.* 470.

Saying that he believes and hopes that a Debt is paid, when ſufficient.

If a Bill be brought againſt three for a joint Demand, and one of them, by Anſwer, ſays, he believes and hopes to prove the Debt paid, and the Cauſe is heard on Bill and Anſwer as to him, the Plaintiff can have no Decree, for the Defendant does not directly ſwear that the Money is paid, yet his Anſwer muſt be taken to be true, becauſe the Plaintiff, by not replying to him, has excluded him of the Benefit of his Proof, and the rather, becauſe it appears a Piece of Cunning in the Plaintiff to proceed againſt him who was moſt ignorant of the Matter; but upon Payment of Coſts he may reply to the other Defendants. *Hill.* 1682, between *Barker* and *Wyld.* 1 *Vern.* 140.

That one Defendant hath peruſed the Anſwer of another, when ſufficient.

Where in a joint and ſeveral Anſwer by *A.* and *B.* if *A.* for himſelf anſwers, and *B.* ſays that he has peruſed the Anſwer of *A.* and believes it to be true, ſuppoſing *B.* to be charged with nothing of his own Knowledge, ſuch a relative Anſwer is ſufficient; but it is otherwiſe,

where the Defendants anſwer ſeverally. Between *Walker* and *Norton*. *Hard.* 105.

An inſufficient Anſwer put in by one Defendant, and the like Anſwer by a ſecond, the Court will judge of the inſufficiency of the ſecond.

If there are two Defendants to a Bill, and one of them puts in an inſufficient Anſwer, which is ſo reported, and on Exceptions to the Maſter's Report, his Report is confirmed by the Court, and afterwards the other Defendant puts in juſt ſuch another Anſwer, and inſiſts on the ſame Matter, the Court for avoiding Delay, will judge of the Inſufficiency of this ſecond Anſwer, without ſending it to a Maſter. 1 *Vern.* 74.

Sufficient to give a full Anſwer to the Thing in demand.

In a Bill for Tythes of Conies by Cuſtom, the Defendant, by Anſwer, denies the Cuſtom, but does not diſcover how many Conies he killed, nor the Value of them; yet it was reſolved well enough, the rather becauſe the Demand was againſt common Right, and where a full Anſwer is given to the Thing in Demand, 'till that be tried, the Defendants are not bound to diſcover; if it ſhould be otherwiſe, the Defendant, by a feigned Suggeſtion, might be forced to diſcover any Thing: But if in ſuch Caſe, the Matter be found againſt the Defendant, he ſhall after be examined upon Interrogatories. Between *Randal* and *Head*, *Hard.* 188. *Bac. Eq. Ca.* 35.

An Executor muſt anſwer as to a diſcovery of Aſſets, tho' he denies the Debt.

But where there is no ſuch great Inconvenience, as upon a Bill againſt an Executor

cutor to diſcover Aſſets, he muſt anſwer, tho' he denies the Debt, becauſe it concerns the Act of another. *Ibidem.*

Where the Party may conclude, charge or diſcharge himſelf by his Anſwer.

Defendant concluded by his Anſwer, and denied to amend it, tho' miſtaken in the Law.

AN Executor has a Legacy deviſed to him by his Teſtator, without any expreſs Diſpoſition by the Will, of the Surplus of the perſonal Eſtate; on a Bill brought by the next of Kin to the Teſtator for a Diſtribution, the Executor anſwers, and waives the Benefit of the Surplus, by a Miſtake of the Law in that Point; he prayed that he might amend his Anſwer, but was denied by the Maſter of the Rolls, who ordered, that having waived the Surplus by his Anſwer, he ſhould account for it to the next of Kin, tho' there was ſtrong Proof that the Teſtator intended the Surplus to the Executor. 1 *Williams*, 298.

Feme Covert cannot bind herſelf or her Huſband.

A *Feme Covert* cannot bind herſelf by her Anſwer, much leſs her Huſband, as to her Inheritance. 2 *Williams* 451.

A Purchaſer not bound by an improvident Offer in his Anſwer.

The Defendant pleaded himſelf a Purchaſer, for a valuable Conſideration, without Notice, as by the Deed, *&c.* ready to be produced, may appear; and upon arguing the Plea, it was ordered

to ſtand for an Anſwer; and it being moved, that the Defendant might leave the Deed with his Clerk in Court, that the Plaintiff might have the Sight and Peruſal of it, purſuant to the Offer in his Anſwer; and tho' the Bar (being aſked by the Court how the Courſe was) agreed that by his Offer the Defendant had made the Deed Part of his Anſwer, and therefore it had been the Courſe to order it to be produced, yet my Lord Chancellor ſaid he would not bind the Defendant, being a Purchaſer, by the improvident Offer in his Anſwer. *Mich.* 1698, between *Watkins* and *Hatchet. Bac. Eq. Ca.* 36.

Infants bound by Anſwer in ſome Caſes, tho' prejudicial to them.

An Eſtate was conveyed in Truſt to be ſold to pay Incumbrances, the Reſidue in Truſt for the Grantor and his Heir; upon a Bill brought by another Creditor againſt the Truſtees and Heir, who was a Minor, and the Heir, by her Anſwer, inſiſting that ſhe being an Infant, the Parol ought to demur during the Minority; becauſe, altho' it was a Truſt for Payment of Incumbrances which then affected the ſame, yet as to the Reſidue it was only Aſſets; it was ordered accordingly, altho' the Infant's Council would have waived it as prejudicial to the Infant. *Ca.* in *Equ.* 198. *Searth* againſt *Cotton.*

Defendant held down to the Offer in his Anſwer.

The Plaintiff brought a Bill againſt the Defendant, to redeem or be foreclоſed;

cloſed; the Defendant, in his Anſwer, offered to pay the Plaintiff what was due on his Mortgage; but finding afterwards that there was a Mortgage prior to the Plaintiff's, and that the Mortgagor had made a Deed of Truſt of theſe Lands for the Payment of his Debts, and that the Creditors had obtained a Decree, that they ſhould be paid in proportion with the Plaintiff, he would willingly retract; but tho' it appeared, that the Circumſtances of the Caſe were thus varied, yet the Maſter of the Rolls held the Defendant to the Offer in his Anſwer. *Paſch.* 1687, *Holford* and *Purnel. Vern.* 448.

But where a Perſon having ſworn in his Anſwer, to avoid a *Sequeſtration* of the Debt, that he was ſatisfied a Debt owing to him, in a Bill now brought by him for the ſaid Debt, the Maſter of the Rolls would not ſuffer that Anſwer to be read againſt him. *Mich.* 1669, between *Jones* and *Lenthall.* 1 *Ch. Ca.* 154.

But not where a Defendant, to avoid *Sequeſtration*, owned he was ſatisfied a Debt.

Rule, by Lord Chief Juſtice *Whitſhed*, on a Trial by leading Order at *Naas*, in the Caſe of *Nicholſon* againſt *Connor*, to be obſerved on conſtruction of Anſwers, That if a Defendant confeſſes a Fact charged, but avoids, qualifies, and extends it to other Matters done at the ſame Time, the whole muſt be admitted

When a Man may charge and diſcharge himſelf by his Anſwer.

as it is qualified. As if the Bill charges, that *A. B.* received one Hundred Pounds from *C. D. C. D.* anſwers, that he did receive one Hundred Pounds from *A. B.* which *A. B.* owed him, and no other; that is but one Sentence, and cannot be divided; for the Defendant, *C. D.* does, as it were with one Breath, deny the Fact. Exception to this is, if there be a Preſumption againſt the Qualification, that muſt be proved, tho' in one Sentence, as if a Man ſhould confeſs he killed another in his own Defence. The Killing ſhall ſtand by itſelf as confeſſed, and the Qualification muſt be proved, becauſe the Law preſumes Deſign, and throws the Proof on the Criminal. So, if the Sentences are diſtinct, where there is no Preſumption, the Qualification after comes too late, and infers that the Acts were done at different Times; as if the Anſwer had been, that it was true, that Defendant did borrow the Hundred Pounds charged in the Bill, but that he had ſince repaid it; here the Confeſſion ſhall be divided, and Part accepted, and that Part, as to the Payment, rejected, unleſs proved.

Ibidem. It was ſaid *per Cur.* that the Caſe of *Howard* and *Brown* was the firſt Caſe in the Court; where, becauſe a Man had charged himſelf by Anſwer, that this Anſwer ſhould be allowed as a good Diſcharge, and that it ought to be the laſt. 2 *Vern.* 194. Where an Accountant may charge

charge or diſcharge himſelf by Anſwer, See *Title Account.*

If the Plaintiff conveys an Eſtate abſolutely to the Defendant, and he afterwards brings a Bill to redeem, and the Defendant inſiſts that the Conveyance was abſolute, but confeſſes, that after the Money paid, with Intereſt, it was to be in Truſt for the Plaintiff's Wife and Children, and the Plaintiff replies to the Anſwer, the Truſt will be decreed for the Benefit of the Wife and Children, though no other Proof of the Truſt; for, it appears, by the Defendant's own Confeſſion, that he was not to have the Eſtate abſolutely. *Paſch.* 1693, between *Hampton* and *Spencer.* 2 *Vern.* 288. Defendant charged by his Anſwer.

Of Pleas and Demurrers in Equity.

AMONG the *Civilians* and *Canoniſts*, the Exceptions are in *Loco Reſponſionis*, and are three fold, Declinatory, Dilatory, and Peremptory. The Declinatory, are ſuch as decline the Juriſdiction of the Judge; Dilatory, are ſuch as delay Suits, by Exceptions to the Perſon of the Actor; Peremptory, are ſuch as *Perimunt Jus Agentis*, as a Releaſe, or former Suit determined, *&c.* Of the Exceptions among the Civilians and Canoniſts, and the ſeveral Kinds.

The declinatory and dilatory Exceptions, are generally put in *Ante Litem conteſtatam*; for they are before the *Prætor*, as Reaſons why he ſhould not proceed in the Cauſe to give Judges; but the peremptory Exceptions might as well be put in before the *Prætor* as a Reaſon why he ſhould not give Judges, as before the Judges to preclude the Plaintiff from all Right of Action; and the Method was, that if the peremptory Exception was proved exceeding early before the *Prætor*, he proceeded no farther in the Cauſe; but if the peremptory Exception was either doubtful, in Point of Law, or in Point of Fact, then he remitted it to the Judges to determine it, ſince it was then proper that it ſhould be put in Judgment. *Maranta*, 280.

The Analogy between them and Demurrers and Pleas in Equity.

Analagous to theſe, we have three Sorts of Exceptions, which with us are called either Pleas or Demurrers, and they may be alſo called Declinatory, Dilatory, and Peremptory.

Ibidem.

Firſt, The declinatory Exception, and that is, either a Demurrer for want of Equity in the Plaintiff's Bill, or becauſe his proper Proceeding or Remedy is at Law.

Ibidem.

Secondly, The dilatory Exception, and that is either the Plea of Outlawry, or Excommunication, or Demurrer, for want of proper Parties.

Thirdly,

Thirdly, The peremptory Exception, of which there are ſeveral Kinds, *to wit*, that there is a Bill already depending, in another, or the ſame Court of Equity, for the ſame Cauſe. That the Matter has been already decided, or decreed in a Court of Equity; an Account ſtated, a Releaſe, a Purchaſe for valuable Conſideration, without Notice; a Fine and Non-claim, and ſuch like, all which ſhall be treated of in their proper Places. Ibidem.

And 1ſt. *Of Demurrers in Equity, and what ſhall be a good Cauſe of Demurrer, and* e contra.

A DEMURRER is the Allegation of the Defendant, which, admitting the Matters of Fact, or ſome of them, alledged by the Plaintiff in his Bill, to be true, ſhews that as they are ſet forth by the Plaintiff himſelf, they are inſufficient for him to proceed upon, or to oblige the Defendant to make Anſwer to; and therefore it demands the Judgment of the Court, whether the Defendant ſhall be compelled to make Anſwer to the Plaintiff's Bill, or to ſome certain Part thereof; and it is to be argued in Court, it cannot be referred. Demurrer, what.

To be argued in Court, it cannot be referred.

And

Demurrers, general or ſpecial.

And Demurrers are either general or ſpecial.

No Informality in Pleading to be taken Advantage of, in a general Demurrer.

By Statute 10 *Cha.* 1. ch. 11. no Informality, in Pleading, ſhall be taken Advantage of in a general Demurrer; but a Man may demur generally, and may, *Ore tenus* at the Bar, demur for want of Equity, and ſhew any ſubſtantial Fault in the Bill.

Particular Cauſes of Demurrers expreſſed, and over-ruled, Defendant to pay Coſts.

Tho' Counſel may demur *Ore Tenus*, if he has expreſſed particular Cauſes of of Demurrer, and they are over-ruled, the Defendant ſhall pay Coſts of the Cauſes particularly alledged and diſallowed.

The Cauſes of Demurrers, and the difference between a Demurrer and a Plea.

The Cauſes of Demurrers are properly upon Matters defective in the Plaintiff's Bill, and not for any foreign Matter alledged, which is the Difference between the Plea and Demurrer; and therefore, in the Demurrer it is, as appears by the Plaintiff's own ſhewing.

Demurrer for want of Equity in the Bill.

If the Plaintiff's Bill doth not contain Equity, it is a good Cauſe of Demurrer, and this is properly a declinatory Exception; becauſe it hinders the Plaintiff from proceeding in *Foro prætorio*, or Court of Equity.

That the Plaintiff's Remedy is at Law, but if the Demand be

That the Plaintiff's Remedy is at Law, and this is alſo a declinatory Exception,

ception, and is either when the Plaintiff proceeds upon a certain Demand, as upon a Note, Bond, or the like; and here, the Defendant may demur to the Relief; becauſe he has a Right to try the Validity of ſuch a Note or Bond by a Jury; but then it is ſaid he muſt deny the Note, or Bond, for if he confeſſes them, he cannot demur to the Relief; for ſince he has acknowledged the Money to be due, he ought not to put the Party to Expence by conteſting the Payment of it in another Court. *Sed Quær.* for were this to be the Caſe, that Courts of Equity ſhould thus take on them the Deciſion of Matters, meerly determinable at Law, they would quickly ſhake the Foundation of all the Ancient *Municipal* Laws of the Realm, and render all the Courts of Law, with our peculiar happy Advantage of Trials by Juries, (that ineſtimable Bulwark of of our Liberty,) of little or no Uſe, as to Matters of Property. In Juſtice therefore to the Conſtitution, and the Public in general, without regarding what may be the private Inconvenience of Individuals, Courts of Equity are bound to reſtrain their own Juriſdiction within its proper Limits, and never to exceed them; and this for theſe twenty Years laſt paſt ſeems to have been the prevailing and eſtabliſhed Opinion; and indeed, otherwiſe, it would be exerciſing a legiſlative Authority, and making new

certain, the Defendant muſt deny it. *Sed Quær.*

new Laws. See the Caſe of *Swan* againſt the Governors of *Stephens*'s Hoſpital in Chancery here, in 1759, and afterwards brought before the Houſe of Lords of *Great Britain*, on an Appeal; and the Caſe of *King* and *King*, alſo in Chancery, *Eaſter* Term, 1760.

Or where the Suit is on a Bond or Covenant for a Sum certain, a Demurrer may be, if Affidavit be not made of the loſs of the Bond or Deed.

So where a Man comes into Equity upon a Bond or Covenant for a Sum certain, and don't annex an Affidavit of the Loſs of it, 'tis a good Cauſe of Demurrer; becauſe, whether *Factum*, or not, is properly determinable at Law, where, if it be found againſt the Defendant, there is a Fine to the King for denying his Deed.

If the Defendant confeſſes the Deed in his Anſwer, he can't demur to the Relief.

But if the Defendant, without taking Advantage of ſuch Demurrer, for want of an Affidavit of the Loſs of the Deed, confeſſes the Deed in his Anſwer, there he can't demur to the Relief, and has nothing to do but pay the Money; for after confeſſing the Deed, it would be contrary to Conſcience to litigate it upon the Iſſue of *Non eſt Factum* at Law; but if he denies the Deed, he may demur to the Relief, becauſe he has a Right to have it tried by a Jury, whether it be his Deed or not.

If an Affidavit be annexed of the Loſs of the Deed, Defendant cannot demur.

If an Affidavit be annexed of the Loſs of the Deed, the Defendant can't demur to the Relief; becauſe the Relief

lief is in Equity, and not at Law; for the Plaintiff cannot make his Proof at Law without the Deed itſelf: But he may make his Proof in Equity how the Deed was loſt or burnt, and proceed againſt the Defendant for the Recovery of the Money.

But if upon the Deed there be no Relief but in Equity, there needeth not an Affidavit of the Loſs of it.

But if, upon the Deed, there is no Relief at Law, as if it be upon a Truſt which is only determinable in Equity, or for a ſpecifick Execution of a Covenant, there, the Plaintiff need not annex an Affidavit to his Bill of the Loſs of ſuch Deed, nor will a Demurrer be allowed for want of ſuch Affidavit, becauſe his Relief is not *alieni Fori*, and he could have no Relief in a Court of Law upon ſuch Deed.

Where the Bill is for Diſcovery only of a Deed, or Bond, an Affidavit muſt be made of the Loſs of it

But this Affidavit need not be where the Bill is for Diſcovery of Deeds in general.

But this Diſtinction has been taken of late, that wherever a Bill is brought for the Diſcovery of a particular Deed, or Bond, upon which there is a proper Remedy at Law, there muſt be an Affidavit annexed to the Bill, of the Loſs of it, tho' it be but for a Diſcovery; becauſe, otherwiſe, the Anſwer would be but an unneceſſary Expence; but if it be for the Diſcovery of Writings in general, there is no need to annex an Affidavit to ſuch Bill.

Demurrer to a Bill for Damages, uncertain.

When a Plaintiff goes into a Court of Equity for Damages, which are uncertain, and not to be ſettled but by a Jury,

a Jury, the Defendant may demur to the Relief, having firſt anſwered to the Damages; becauſe it is *Alieni Fori*, ſince the Court can't ſettle the Damages: But this muſt be *Ante Litis Conteſtationem*; for if he anſwers and conteſts without demurring, there he can take no Advantage of it at the Hearing, for he has ſubmitted to the Juriſdiction of the Court, and the Court will try at Law the *Quantum* of the Damages by a feigned Action of *Quantum Dampnificatus*. So on the Demurrer, *Ante Litis Conteſtationem*, if the Plaintiff will go on for the Damages confeſſed, the Court will retain the Bill *quoad* thoſe Damages, allowing the Demurrer as to any further Relief.

Leading order.

Demurrer, for want of Parties, and this may be at the Hearing.

A Demurrer may be for want of proper Parties, and this is a dilatory Exception, and may be as well at the Hearing, as before Anſwer; for the Court can't make a proper Decree, where all Perſons, who are to be bound by it, are not before the Court. And this Demurrer, for want of Parties, is properly a declinatory Exception; for when the proper Parties are added, the Plaintiff may proceed. See *Title Hearing*.

Things of a diſtinct Nature joined in one Bill againſt different Defendants, the Bill is nought.

A Bill, if it concerns Things of diſtinct Natures, and is brought againſt ſeveral Perſons, which will occaſion ſeveral Anſwers, and Examinations, is nought;

nought; beſides, each Party would be obliged to take Copies of what no way concerned his own Cauſe, whereby his Charge would be increaſed to no Purpoſe. Reſolved upon Demurrer, 15 *Cha.* 2. Between *Berk* and *Harris*, *Hard.* 337.

But where the Defendant demurred, becauſe the Plaintiff's Bill was brought againſt ſeveral Defendants, for ſeveral diſtinct Matters, yet the Demurrer was over-ruled, becauſe the Plaintiff, by his Bill, had charged the Defendants with Combination, which the Defendant had not denied by Anſwer. 1 *Vern.* 416. 463. *Bunb. Rep.* 69. For the Combination being a Charge, which extends to all the Defendants does (if not denied) ſo tie and link all other Charges contained in the Bill, that makes it neceſſary to make them all Parties.

But not where the Bill charged Combination, which the Defendant had not denied.

Where a Man demurs, for that the Bill contains ſeveral Matters not relating one to the other, and in ſome whereof the Defendant is not concerned, if by Anſwer the Defendant doth more than barely deny Combination, and Confederacy, he over-rules his Demurrer. *Trin.* 1687. between *Heſter* and *Weſton.* 1 *Vern.* 463.

Defendant by his Anſwer is only to deny Combination and Confederacy.

Yet ſometimes, for avoiding multiplicity of Suits, and to bring all Parties, who

In ſome Caſes, it may be againſt diverſe Parties who have ſeparate Rights and Intereſts.

who may be affected, before the Court, the Suit may be by or againſt diverſe Parties, who have ſeparate Rights and Intereſts, as Deviſees, Creditors, and the like.

Defendant may demur to a Bill which ſeems a Diſcovery of a Thing which may cauſe a Forfeiture.

A Bill was exhibited againſt the Defendant to have her diſcover whether ſhe was married ſince the Death of her Huſband, to which ſhe demurred, and aſſigned for Cauſe, that ſeveral Goods and Chattels were deviſed to her by her Huſband, which ſhe was to enjoy during her Widowhood only; and that a Diſcovery might amount to a Forfeiture of her Intereſt in them, and the Court allowed the Demurrer. 24 *Ca.* 2 *Monnins* againſt *Monnins.* 2 *Ch. Rep.* 68. See *Bills of Diſcovery, Title Bills.*

A Huſband may demurr to a Bill that ſeeks a Diſcovery of hard Uſage to his Wife.

The Bill was to eſtabliſh an Agreement for a ſeparate Maintenance for the Defendant's Wife, and (among other Things) prayed a Diſcovery of ſeveral Unkindneſſes and Hardſhips which the Defendant, as it was pretended, had uſed towards his Wife, to make her recede from this Agreement; to which Diſcovery the Defendant demurred, for that it was not a Matter properly examinable or relievable in this Court, and the Demurrer was allowed. *Mich.* 1683. Between *Hincks* and *Nelthorpe.* 1 *Vern.* 204.

A Bill being exhibited againſt a Bond of the Teſtator's, ſuggeſting that it was entered into without any Conſideration, it being only for that the Teſtator had unlawfully kept Company with the Defendant, and had a Baſtard by her, and a Demurrer to that Part of the Bill was allowed; although it ſeems by the Caſe to be admitted, that a Demurrer was not the proper Way to be relieved for Scandal, but that the Bill ought to be referred and the Scandal expunged. *Mich.* 1682, between *Page* and *Neale*. 1 *Vern.* 107.

Not proper to demur to a Bill for Scandal, but the Bill to be referred, and the Scandal expunged.

A Bill was brought by the Obligee, in a Bond againſt the Heir of the Obligor, alledging that he having Aſſets by Deſcent ought to ſatisfy this Bond; to which the Defendant demurred, becauſe the Plaintiff had not expreſsly alledged in the Bill that the Heir was bound in the Bond; and though it was alledged that the Heir ought to pay the Debt, yet that was held inſufficient, and the Demurrer was allowed. Between *Croſſing* and *Honor*. 1 *Vern.* 180.

An Heir may demur to a Bill brought againſt him for Payment of a Bond, unleſs it be particularly alledged that he is bound.

If an Infant is intitled to the Truſt of Lands in Fee, which were deviſed to her by her Uncle, and ſhe marries without her Father's Conſent, and the Father brings a Bill againſt the Huſband and Wife, and her Truſtees, to the Intent a Proviſion might be made for her and her Children out of theſe Lands, and the

Where a Perſon by his own Bill ſhews he has no Right, a good Cauſe of Demurrer.

Huſband and Wife demur; this Demurrer will be allowed, for it appears, by the Plaintiff's own ſhewing, that he hath no Right either in Law or in Equity to the Lands in queſtion. Between *Mico* and *Powell. Vern.* 39.

Or where a Right does not appear by the Bill.

A Bill being exhibited to diſcover a perſonal Eſtate and Will, the Defendants demurred, becauſe it appeared, on the Plaintiff's own ſhewing, that they were neither Creditors, or Legatees, and the Demurrer was allowed. *Nel. Ch. Rep.* 88.

A Witneſs cannot demur to an Interogatory, though it be not pertinent to the Matter in iſſue.

A Bill being exhibited to prove a Will, and perpetuate the Teſtimony of the Witneſſes, the Defendant, upon croſs Examination of one of the Witneſſes, exhibited an Interrogatory to him, to diſcover what Deeds or Settlements he knew the Teſtator had made; to which the Witneſs demurred, as not pertinent to the Matter in iſſue, and the Lord Keeper over-ruled the Demurrer, becauſe he would not introduce ſuch a Precedent as for a Witneſs to Demur, for it did not concern the Witneſs to examine what was the Point in iſſue. *Aſhton* againſt *Aſhton. Vern.* 165.

No Demurrer to a *Subpœna* in nature of a *Scire facias.*

There can be no Demurrer to a *Subpœna* in nature of a *Scire facias*, for the *Subpœna* is no Record, nor any where filed. 1 *Ch. Ca.* 50.

In

Arbitrators, if they are made Parties, may demur, for there can be no Decree againſt them.

In a Bill to be relieved againſt an Award made by ſome of the Members of the Company, touching the *quantum* of Freight, due to the Plaintiff from the Company, the Arbitrators, and ſome of the particular Members being made Defendants, they demurred to the whole Bill, becauſe the Plaintiff could have no Decree againſt them, and their Anſwers would be no Evidence againſt the Company, and the Plaintiff might examine them as Witneſſes, and the Demurrer was allowed, without putting them to anſwer, as to Matters of Fraud and Contrivance. *Trinity* 1700, Dr. *Stewart* v. *Eaſt. Ind. Co.* 2 *Vern.* 380.

A Defendant cannot demur but for Matter appearing in the Bill, but a Witneſs may for Matter *Debors* the Interrogatory.

A Defendant cannot demur to a Bill, but for Matter appearing in the Bill itſelf, but a Witneſs may demur for Matters *Debors* to the Interrogatory, becauſe he has no other way to relieve himſelf, but by Demurrer; but then the Facts muſt be verified by Affidavits, unleſs they appear by the Cauſe. *Moſeley's Rep.* 229.

Bill to make good the defective Execution of a Power, Defendant cannot demur that Plaintiff of his own ſhewing has no Title.

If the End of a Bill is to have the defective Execution of a Power made good, the Defendant cannot demur, that the Plaintiff of his own Shewing hath no Title. *Ibid.* 228.

Demurrer to the Replication.

Where the Replication contained new Matter not in the Bill or Anſwer, and which Matter the Plaintiff knew of at the Time of exhibiting his Bill, the Defendant pleaded and demurred to the Replication, which the Court allowed of. 1 *Ch. Rep.* 259.

Demurrer for making a Perſon a Party to a Bill, againſt whom no Decree can be had.

Where a Perſon is made a Party to a Bill, againſt whom no Decree can be obtained, but he might as well have been examined as a Witneſs, ſuch a Party may demur to the Bill, and the Demurrer ſhall be allowed. 2 *Vern.* 380.

Defendant may demur to a Bill for a Matter for which there is no Relief by Equity.

Where a Bill is brought for any Thing for which by the known Rules and Orders of Equity, the Plaintiff can have no Relief, the Defendant may ſhew ſuch Matter for Cauſe of Demurrer. 2 *Har. Ch. Pract.* 3d Edit. 396.

No Demurrer to an Anſwer.

No Demurrer can be to an Anſwer, but where an Anſwer tends to draw a Re-examination of a Matter (on a Bill of Revivor) already contained within the Decree, the Court muſt be moved for an Order to reſtrain an Examination of all Matters formerly examined to and ſettled. 1 *Cha. Ca.* 56.

No Demurrer to a Bill to perpetuate, the De-

A Defendant demurred to a Bill to perpetuate, *&c.* whereas he ſhould not have demurred,

demurred, but either aſſent by his Anſwer to examine, or ſhew ſufficient Cauſe why Witneſſes ſhould not be examined, and left it to the Conſideration of the Court whether the Cauſe be ſufficient or no, and the Defendant was accordingly ordered to withdraw his Demurrer, and put in an Anſwer, and thereby either conſent to ſuch Examination, or ſhew Cauſe to the contrary. 2 *Har. Chanc. Pract.* 3d Edit. 43.

Defendant is to ſhew Cauſe againſt the Examination, if any, by his Anſwer.

Of Pleas in Equity.

A PLEA in Equity is a Sort of ſpecial Matter pleaded by a Defendant to a Bill, or to ſome Part thereof, ſhewing and relying upon one or more Facts ſet forth in the Plea, as a Cauſe why the Plaintiff ought not to be relieved in ſome Matter contained in his Bill.

Plea, what.

And Pleas in Equity are two fold, either Pleas in Abatement or Pleas in Bar.

Pleas in Abatement, and Pleas in Bar.

And Pleas in Abatement, are either to the Juriſdiction of the Court, or in Diſability of the Perſon.

Pleas in Abatement.

Firſt, To the Juriſdiction of the Court, and this is a *peremptory Exception*, and

Plea in Abatement to the Juriſdiction of the Court,

where another Court is poſſeſſed of the Cauſe; it need not be ſet down to be argued.

is where another Court is already poſſeſſed of the Cauſe, and this Plea is called *Lis pendens*; and it is certainly a good Plea, and need not be ſet down to be argued, and therefore the only Queſtion is, whether it be a true one, and ſo the Trial of the Fact is to be referred

Is to be referred to the Officer.

to the proper Officer, * who is to certify whether they be one and the ſame Bill, or to the ſame Purpoſe, and ſuch Reference muſt be procured by the Plaintiff, and a Report thereon, within ſuch Time after the Filing of ſuch Plea, as the Court ſhall, upon Motion, order and appoint, otherwiſe the Cauſe ſtands diſmiſſed of courſe with Coſts.

The Proceedings in caſe the Officer certifies that the two Bills are the ſame.

And if the Officer certifies that the two Bills are for one and the ſame Matter, and to the ſame Purpoſe, the Bill in this Court ſhall be diſmiſſed with Coſts. For the further Proceedings, See *Title Bills.*

A Suit at Law cannot be pleaded, but Plaintiff muſt make his Election.

The Defendant cannot plead a Suit at Law, becauſe the Plaintiff has a Right to the Defendant's Oath in Equity, to ſuperſede the Neceſſity of having Proof at Law; but when the Plaintiff has got in the Anſwer of the Defendant, he muſt

* In this Court, one of the puiſne Barons, is the Officer miniſterial for this Purpoſe, as he is alſo on References of Anſwers, for Inſufficiency, and for ſeveral other Purpoſes.

muſt make his Election, either to proceed at Law, or in Equity, that the Defendant may not be doubly taxed, unleſs the Bill be for Diſcovery only. See *Title Bills.*

Another Plea to the Juriſdiction of the Court, is, that the Defendant ought not to be ſued in this, but in ſome other Court, as being their Officer or Miniſter, and this is called a Plea of Privilege, and this is alſo a *peremptory Exception.*

Plea to the Juriſdiction of the Court as to Privilege.

Secondly, *In Diſability of the Perſon*; and this is either the Plea of Outlawry, or Excommunication, which are, *dilatory Exceptions*; and they muſt be pleaded, *ante Litem conteſtatam*: For after Anſwer the Defendant admits the Plaintiff as proper to be anſwered unto, and therefore, then, ſuch a Plea would come too late. But though an Outlawry be not pleaded before Anſwer, yet it may (if the Plaintiff's Demand be perſonal) be ſhewed at the Hearing as a peremptory Matter, becauſe it ſhews the Right of the Thing to be in the King; for the Outlawry binds the perſonal Thing, from the Commencement of it, but not the real, till the Writ of Seizure.

Plea in Abatement in Diſability of the Perſon, and when to be pleaded.

Theſe Pleas need not be ſet down in four Days after filing them, as other Pleas and Demurrers are to be, or to ſtand over-ruled; but the Plaintiff muſt

Need not be ſet down, unleſs inſufficient in Point of Form.

ſet them down, if there be any Inſufficiency in Point of Form in Pleading, for they appear upon ſhewing to be good Pleas; and they need not be ſworn to, for if the Outlawry be pleaded, the Record or the *Capias* thereupon, muſt be pleaded *Sub Pede Sigilli*, and it is generally annexed to the Plea; and a Matter of Record, cannot receive greater Strength from the Oath of the Party, being itſelf the higheſt Evidence that can be produced; and when Excommunication is pleaded, it muſt be certified by the Ordinary, either by Letters patent, containing a poſitive Affirmation, that the Plaintiff ſtands excommunicated, and for what Crime; or by Letters teſtimonial, reciting *quod ſcrutatis Regiſtris invenitur*, &c. and either of them muſt be *Sub Sigillo*, and annexed to the Defendant's Plea, and therefore being *Sub Sigillo*, it need not be ſworn to. *Sed Quær. vide* 2 *Vern.* 37. Where a Plea of Outlawry was diſallowed, becauſe it was not put in upon Oath, and *e contra* 198. See the 41*ſt general Rule*. See *Stat.* 6 *Ann.* ch. 10. See *Page* 137.

Need not be ſworn to.

Plea of Excommunication need not be ſworn to; and the Requiſites to be performed on pleading it.

But if the Bill be to be relieved againſt an Action at Law, and an Outlawry in the ſame Cauſe be pleaded by the Defendant, it is a bad Plea; becauſe the Outlawry is the Thing prayed to be relieved againſt, and it is *Exceptio ejuſdem Rei cujus petitur Diſſolutio.*

Bill to be relieved againſt an Action at Law, Outlawry in the ſame Cauſe no good Plea.

Outlawry

Outlawry is no good Plea to an Executor, Adminiſtrator, or Guardian, becauſe they ſue in *Auter Droit*.

Outlawry no Plea to an Executor, Adminiſtrator, or Guardian.

If the Plaintiff is an Alien, it is a good Plea, and he ſhall not be at Liberty to proceed.

A good Plea that Plaintiff is an Alien.

A good Method to avoid the Plea of an Outlawry, is to make all thoſe that have Outlawries againſt the Party, Defendants. 2 *Vern.* 199. *per Lord Hutchins.*

Method to avoid the Plea of Outlawry.

The Plea of Outlawry continues only in Force, until the Outlawry is reverſed, but hinders all Proceedings in the mean Time; and when the Outlawry is reverſed, the Plaintiff upon Payment of 20*s.* Coſts, (if the Plea is not argued) ſerves the Defendant with a *Subpœna* to anſwer the ſame Bill. *Ord. Ch.* 98, *Harriſon's Chan. Pract.* 3*d* Edit. 389.

Plea of Outlawry only in Force, till the Outlawry is reverſed.

Of Pleas in Bar.

FIRST, *That the Matter has been already decided, or decreed in a Court of Equity*; and this is alſo a *peremptory Exception*, and is moſt certainly a good Plea; becauſe what hath been already adjudged,

Former Decree of the ſame Matter, a good Plea in Bar.

If the Decree be enrolled, the Plea need not be ſworn to, but muſt it it be only in Paper.

adjudged, ought not again to be brought into Controverſy: And if the Decree be enrolled, a Proffer may be made of the Record in Court, without Swearing the Plea; but if it be in Paper, ſo that it can't be ſhewn to the Court, there the Plea muſt be upon Oath.

A Judgment at Law, cannot be pleaded in Bar to a Suit in Equity.

A Judgment at Law cannot be pleaded in Bar, to a Suit in Equity; for the Judgment might have been obtained contrary to Conſcience; and then if ſuch Judgment were allowed a Bar, it would be *Exceptio ejuſdem Rei, cujus petitur Diſſolutio.*

An Account ſtated a good Plea in Bar.

Secondly, *An Account ſtated*, alſo a *peremptory Exception.* If Fraud be objected to ſuch an Account, all Circumſtances of Fraud muſt be anſwered, and denied, and then it will certainly be a good Bar; for it is not *Exceptio ejuſdem Rei, cujus petitur Diſſolutio*; for that, which is objected to the Account, and which if true, would ſet it aſide, is denied, and the other Party is at Liberty to prove it on the Defendant; if this were not a good Plea, no Man would be ſafe in ſtating his Account, and delivering up his Vouchers, touching the Particulars; and therefore, the Plaintiff who has the Vouchers delivered up to him (which always ought to be Part of the Plea) muſt aſſign Error in the Account, which it is ſuppoſed he is able to do, having the Vouchers in his Hands.

But it muſt be pleaded, that all Vouchers were delivered up.

Thirdly,

Thirdly, A *Releaſe.* This alſo is a *peremptory Exception*; but then the Defendant muſt ſet out the Conſideration, upon which ſuch Releaſe was made, and all Circumſtances of Fraud muſt be denied, and it muſt be always under Seal; otherwiſe it is to be pleaded as a ſtated Account only.

A Releaſe a good Plea in Bar, but it muſt be under Seal, or elſe be pleaded as a ſtated Account.

Fourthly, *A Purchaſer for valuable Conſideration without Notice.* This is a good peremptory Plea, but it muſt be pleaded that the Vender was ſeized in Fee, or that you did believe, at the Time of making the Purchaſe, that he was ſo ſeized; and the Conſideration muſt be ſet forth, that the Court may judge whether it be a valuable Conſideration or not; for, if you have not paid ſuch a Conſideration, you are not a Purchaſer, but a Volunteer; but the Deeds need not be ſet forth any farther than the Dates and Parties Names, and the Contents briefly, and the Time of making them; for it would be hard upon the Purchaſer, if he was obliged to ſet forth all his Deeds, for then if he had any Flaw, or Defect in his Title, it muſt be laid open, ſo that no Purchaſer would be ſafe or ſecure of his Purchaſe; but Notice muſt be denied both in the Plea and Anſwer; for if you had Notice you are not a conſcionable Purchaſer, and by your Plea it muſt appear that you are, or it will not be a good one; and it muſt be denied in the Anſwer, in

A Purchaſer for valuable Conſideration without Notice, is a good peremptory Plea, and what it is to contain.

in order that the Plaintiff may reply thereto, and go to Proof, if he thinks proper, and being Matter of Fraud, it cannot be covered by the Plea, and Notice muſt be denied at the Time of the Execution of the Deed; for if the Defendant had Notice, he ought not to have proceeded in his Purchaſe, unleſs he had paid his Money, and then it is to be ſpecially pleaded.

If a Tenant in Tail conveys or mortgages, and after gives the Deeds to the Purchaſer, or Mortgagee, or if the Heir in Tail takes up more Money, and gives the Deeds to the Purchaſer, or Mortgagee, he ſhall not be obliged to give up the Deeds, or diſcover the Eſtate.

If a Tenant in Tail makes a Mortgage, or Conveyance for valuable Conſideration, and afterwards gives the Deeds of Entail into the Hands of the Mortgagee, or Purchaſer; or if the Heir in Tail takes up more Money, and delivers him the Deed, and the Heir in Tail exhibits his Bill, though the Defendant cannot plead that the Vender, or Mortgagor, was ſeized in Fee, becauſe he has the Deed of Entail, by which it appears, that he was not; yet, he may ſay, that at the time of the Mortgage, or Purchaſe he did believe and was adviſed, that he was ſo ſeized, and inſiſt that he ſhould not be obliged to deliver the Deeds, or diſcover whether he was Tenant in Tail or not; otherwiſe it would be between Tenant for Life and the remainder Man.

It would be otherwiſe between Tenant for Life and the remainder Man.

The reaſon of the Difference.

The Reaſon of the Difference is, that the Tenant in Tail, being Maſter of the Eſtate, is alſo Maſter of the Deed, and therefore having pledged the Deed, as well as the Eſtate, for Money, the Iſſue in Tail

Tail cannot have the Aid of a Court of Equity to have up ſuch Deed, unleſs he pays the Money; but in the Caſe of Tenant for Life, there he not being Maſter of the Eſtate, ſo as to be able to bar it, had only a particular Property in the Deed, ſo that Equity will order the Deed to be delivered up to the Perſon who was the prior Purchaſer for valuable Conſideration, that is, the remainder Man. Between *Judge*, *Daly*, and the Earl of *Clanrickard*.

The Statute of Frauds and Perjuries, and the Statute of Limitations, are peremptory Pleas in Bar, and what they muſt contain.

Fifthly, *The Statute of Frauds and Perjuries, and that of Limitations*, are peremptory Pleas in Bar, and, in pleading the Statute of Limitations, a Man muſt, by Anſwer ſay, that he has paid the Money, becauſe otherwiſe a Court of Equity ſuppoſes a Truſt between the Plaintiff and Defendant, and the Statute does not reach to Truſts.

The Statute of Fine and Non-claim, a peremptory Plea in bar.

Sixthly, *The Plea of Fine, and Non-claim.* And here it is to be obſerved, that this Plea will bar any Title in Equity, as well as at Law, and is a good Bar thereunto: as if *A.* has Lands in Truſt for *B.* and *C.* enters upon him, and levies a Fine with Proclamations, this will be a good Bar to *B.* the *Ceſtui que Truſt*, as well as to *A.* the Truſtee; becauſe they are both within the Statute; for *C.* has an oppoſite Title, both as to the Truſtee, and *Ceſtui que Truſt*; but then *C.* muſt deny

deny that he claims from *A.* or if he does claim from *A.* he muſt deny that he had Notice from *B.* for if *C.* claims from *A.* there are two Caſes in which the Fine and Non-claim will not bar.

In what Caſe it is no Bar.

Firſt, If the Fine was levied from *A.* to *C.* with Conſent, there, ſince *A.* was under a Truſt, his Conveyance to *C.* was under the ſame Truſt: Or,

Ibidem.

If *A.* levies a Fine to *C.* and *C.* has Notice of the Truſt for *B.* there the Fine and Non-claim is no Bar; becauſe the Conveyance, by the Fine, is under the ſame Truſt, and therefore cannot be ſet up as a Bar to it.

When it ſhall be a Bar.

So that wherever any Perſon is charged with claiming under a Truſtee, he muſt either ſet up an oppoſite Title, or deny his Claim under the Truſtee; or elſe, if he claims under him, he muſt ſet forth the Conſideration, and deny the Notice, to ſhew that this Fine was not infected with the Truſt, for if it was, the Fine and Non-claim can be no bar.

A fraudulent Conveyance ſhall be deemed a Truſt for the right Owner, and a Fine and Non-claim thereon, ſhall be no Bar.

So it is when a Man claims under a Conveyance obtained by Fraud; for when ſuch Conveyance is obtained by Fraud, it only gains a legal Title, and a Truſt ariſeth to the right Owner, to whom Reſtitution ought to be made; and therefore, if ſuch Purchaſer by Fraud, levies a Fine with Proclamations, ſuch Fine

is

is no Bar, becauſe he himſelf held the Eſtate under a Truſt, to reſtore it to the right Owner, and the Fine is no more than a Corroboration of the Title, which was under the Truſt, and not an oppoſite Title to it.

But if he that comes in under a fraudulent Conveyance, ſells by Fine for a valuable Conſideration, and without Notice of the Fraud, it is an oppoſite Title, and the Fine and Non-claim may be ſet up as a Bar.

But they may be ſet up as a Bar, if the Land be ſold by Fine for valuable Conſideration without Notice.

But if he ſells, by Fine, without Conſideration, or with Notice of the Fraud, though upon Conſideration, the Truſt ſtill continues; and therefore, where a Man is charged under a fraudulent Conveyance, if he pleads a Fine and Non-claim, he muſt in this Caſe likewiſe either deny his Claim, under the Perſon committing the Fraud, or if he does come in under him, he muſt ſet forth, that he comes in for a valuable Conſideration, and without Notice of the Fraud.

But if the Land be ſold without Conſideration, or with Notice, tho' upon Conſideration, the Truſt continues.

Secondly, If the Equity or Truſt be created by the Fine, that Fine and Non-claim ſhall never bar the Equity which is created; for this is not an oppoſite Title, but a Title created by the Fine, ſo that it cannot bar the Truſt which was

If the Equity or Truſt be created by the Fine, it ſhall not bar.

was annexed to it, and under which Truſt, the *Ceſtui que Truſt* held it.

If a Party would revive a Decree by way of Original Bill, the other Party may plead the former Decree in Bar.

After a Decree, if the Party againſt whom the Decree is made, intends to review it, but does it by way of Original Bill, and not in Form, nor with the Ceremonies of a Bill of Review, the Defendant, in this new Cauſe, may plead the Decree in Bar. 1 *Har. Cha. Pract.* 3d Edit. 389.

What ſhall be a good Plea, and well pleaded.

Outlawry, not a good Plea to a Bill brought by an Executor.

THE Bill being to be relieved, touching a Debt due to the Plaintiff, as Executor, the Defendant pleaded an Outlawry of the Plaintiff in Bar, but the Plea was over-ruled, the Plaintiff ſuing in *Auter droit*, as Executor. *Killegrew* and *Killegrew.* 1 *Vern.* 184.

Plea of a former Bill depending.

A former Bill depending, was pleaded in Bar of a ſecond; but tho' both Bills were of the ſame Nature, and Effect, yet, as the latter had ſome new Matter, ordered, that being the Plea was good, the Plaintiff ſhould pay the uſual Coſts of a Plea allowed; but the Defendant to anſwer the ſecond Bill, and the former Bill diſmiſſed with 20*s.* Coſts. Between *Crofts* and *Worthy. Mich.* 26 *Car.* 1. 1 *Cha. Ca.* 241.

The

Plea of Parties wanting, which may create multiplicity of Suits.

The Bill being to have an Account of a Truſt, the Defendant pleaded he was intruſted for three Children, *viz.* for the Plaintiff, and his two Brothers, and that the other two not being made Parties, he was not bound to anſwer; for otherwiſe, he might be thrice called to an Account for the ſame Matter, and the Plea was allowed. Between *Hanne* and *Stevens*. 1 *Vern.* 110. Who are to be Parties to the Suit, See, *Title Bills.*

Negative Plea, when good.

The Plaintiff intitles himſelf as Adminiſtrator, the Defendant pleads, the Plaintiff is not Adminiſtrator; it was objected this was a negative Plea. *Per Cur.* allow the Plea, it is a good Plea in Abatement at Law. Between *Wynn* and *Fletcher*. 1 *Vern.* 473.

A Purchaſer muſt plead that he had no Notice.

The Bill was, that the Plaintiff's Father by Settlement on his firſt Marriage, was only Tenant for Life, or elſe Tenant in ſpecial Tail and the Plaintiff was the eldeſt Son of that Marriage, and that Defendant claimed by a ſubſequent Settlement, having Notice of the firſt; the Defendant pleaded a Fine levied by the Father, and ſet forth her Title under the ſecond Settlement, and inſiſted ſhe was a Purchaſer; but did not plead ſhe had no Notice of the firſt Settlement. Lord *Keeper*: The Bill being in the disjunctive, the Defendant might

take it either way, and having pleaded a Fine which is a Bar, ſuppoſing the Father to be Tenant in Tail, allowed the Plea. Between *Creſſet* and *Kittleby*, *Hill.* 1683. 1 *Vern.* 219.

Plea of Privilege when good.

Two of the Defendants being Officers of the *Exchequer*, plead the Privilege of the *Exchequer*; but the Plea was over-ruled, becauſe there was a third Defendant, who had no right of Privilege. Between *Fanſhaw* and *Fanſhaw*, *Trin.* 1684. 1 *Vern.* 246. *Vide Title Privilege.*

Plea of a Purchaſe for valuable Conſideration without Notice, good, tho' the Conſideration be not expreſſed.

If a Bill is brought to be relieved upon a Truſt, and charges the Defendant with Notice of the Truſt, before the taking his Conveyance, the Defendant, by way of Anſwer, may deny the Notice, and plead he is a Purchaſer for valuable Conſideration, without ſhewing what the Conſideration was; tho' it was objected that five Shillings is a valuable, tho' not an equitable Conſideration. But where the Bill charges Notice before the Defendant took his Conveyance, and the Defendant, by way of Anſwer, denies the Notice at the Time of his Purchaſe, or Contract, and pleads he is a Purchaſer, *&c.* This Plea is nought, being founded upon the Anſwer, which denies only Notice at the Time of the Purchaſe, which may be underſtood of the Contract, and not of the Execution

Notice of an Incumbrance any Time before the Conveyance executed ſhall bind.

of

of the Conveyances. *Mich.* 1 *Car.* 2. Between *Moore* and *Mayhew.* 1 *Ch. Ca.* 34. *Hard.* 510.

The Plaintiffs being Mortgagees, the Bill was to diſcover Settlements, and what Eſtate the Mortgagor had in him; to this Bill, the Defendants pleaded two ſeveral Settlements, whereby the Mortgagor was only Tenant for Life; but the Plea was over-ruled, becauſe the Defendants did not offer, by way of Anſwer, to admit the Tenant for Life to be dead, that ſo the Plaintiff might try the validity of theſe Settlements at Law; for if they ſhould expect, till the Tenant for Life was dead, their Witneſſes that could prove the Fraud, might be likewiſe dead: Beſides, the Defendants pleaded thoſe Settlements to be made after Marriage, in purſuance of Promiſſes, and Agreements, made before Marriage, and did not ſet forth what thoſe Promiſes, or Agreements, were. *Hill.* 1682. Lord *Keeper & al. verſus Wild,* and *al.* 1 *Vern.* 139.

Defendant pleads Settlements made after Marriage, in purſuance of an Agreement made before, and does not ſhew what the Agreement was.
No good Plea.

A Plea of a Purchaſer, for a valuable Conſideration, over-ruled, becauſe the Defendant did not alledge Seizin and Poſſeſſion in the Perſon, from whom he bought. *Trin.* 1684. Between *Trevanion* and *Moſſe.* 1 *Vern.* 246.

Plea of a Purchaſe for valuable Conſideration muſt alledge Seizin and Poſſeſſion in the Vendor.

The Defendant pleads himſelf Heir, on the Part of the Mother, and did not ſay he was Heir of the whole Blood. Plea over-ruled.

The Bill was to be relieved touching certain Lands, which the Plaintiff claimed Title to, as Heir on the Part of his Father; the Defendant pleaded, that the Mother was the Purchaſer of thoſe Lands, and that the Defendant was Heir on the Part of the Mother; but it being not pleaded, that the Defendant was Heir of the whole Blood to the Mother, (and in Fact he was only the half Blood to the Mother) for that Reaſon, the Plea was over-ruled. *Hill.* 1686. Between *Addiſon* and *Hindmarſh.* 1 *Vern.* 442.

In a Plea of a former Suit brought for the ſame Matter, not neceſſary to aver that ſuch Suit is depending.

The Defendant pleads, that the Plaintiff brought a former Suit for the ſame Matters, which Suit is ſtill depending, for aught he knows to the Contrary; for the Plaintiff, it was inſiſted, that this Plea was not good, becauſe he does not poſitively aver, that the former Suit is ſtill depending; and no Iſſue can be taken, upon his Knowledge to the contrary. But the Maſter of the Rolls allowed the Plea, becauſe the Defendant ought not to have ſet it down to be argued; for by that he admits that the former Suit, for the ſame Matter, is depending, but the Plea ought to have been referred to a Maſter, to examine whether there was a former Suit depending for the ſame Matter, or not; and ſaid, there needs no poſitive Averment that the former Suit is ſtill depending,

pending, for that is examinable by the Maſter, and the Defendant never ſwears a Plea of a former Suit depending, but it is always put in without Oath. 1 *Vern.* 332. *Vide Hard.* 160. where a Plea was held nought, for want of an Averment in the Concluſion.

And it may be put in without Oath.

A Plea was held ill, becauſe it went as to any Fraud, ſuggeſted, *&c.* and alſo, becauſe it did not aver, that the Accounts which were pleaded, were juſt and true Accounts. *Mich.* 1727. between *Haſtings* and *Draper*. *Bac. Eq. Ca.* 39.

A Plea muſt aver the Accounts pleaded, to be juſt and true.

On Suggeſtion of a groſs Fraud, the Court will, upon an original Bill, overrule a Plea of a Decree, and a Report made thereon, and confirmed, if the Suggeſtion of Fraud be not denied by the Defendant's Anſwer. 2 *Williams* 73.

Plea of a Decree over-ruled, on Suggeſtion of Fraud.

Where a Defendant inſiſts upon the Benefit of the Statute of Limitations, by way of Anſwer, he ſhall at the Hearing, have the like Benefit, as if he had pleaded it. *Ibidem* 145.

Defendant to have the Benefit of the Statute of Limitations at the Hearing, if inſiſted on in his Anſwer, as if he had pleaded it.

To plead to ſuch Parts of the Bill as are not anſwered, is a bad Form of Pleading, becauſe it puts the Court to the Trouble of ſeeing what is not anſwered, and deprives the Plaintiff of the

To plead to ſuch Parts of the Bill as are not anſwered, is bad.

Benefit of taking Exceptions to the Anſwer. *Moſeley's Reports*, 40. *Curs. Canc.* 199. 231.

All Pleas to be put in before Anſwer, and if Defendant anſwers, his Plea is waived.

But all theſe Pleas are to be put in before Anſwer, becauſe they are Reaſons why the Defendant ſhould not anſwer; and therefore, if the Defendant anſwers any Thing, to which he pleads, he overrules his Plea; for the Plea is, why he ſhould not anſwer and conteſt; ſo that if he anſwers, his Plea is waived; but he may anſwer any Thing which is not charged in the Bill, in Aid of his Plea, and he may alſo deny Notice though charged in the Bill, which he alſo denies in his Plea, becauſe that is not putting any Thing in Iſſue, which he would cover by his Plea from being put in Iſſue; but it is adding by way of Anſwer, that which will ſupport his Plea, and not an Anſwer to a Charge in the Bill, which by his Plea he would cover; and though Notice be charged in the Bill, and the Defendant anſwers thereto, yet, being Fraud, it cannot be covered by the Plea, and therefore may be anſwered unto.

A Plea of Outlawry, and a Demurrer for want of Parties, may be offered at the Hearing.

Though this be regularly true, yet there is one Plea, and a Demurrer, which may be offered at the Hearing, as an Outlawry; where the Thing in Conteſt, is veſted in the King by the Outlawry,

Outlawry, and a Demurrer for want of proper Parties; for, the firſt ſhews the Right of the Thing to be in another, and therefore, the Court would do Injuſtice, ſhould they proceed; and by the ſecond, it appears that there can be no Decree, all the Parties, who have an Intereſt in the Demand, not being preſent.

Upon Demurrer at the Hearing for want of Parties, how the Plaintiff is to bring the Cauſe on again, and the Coſts to be paid.

Upon this Demurrer at the Hearing, for want of Parties, if it be allowed, the Court will order the Cauſe to ſtand over, with Liberty for the Plaintiff to amend his Bill, and that the Plaintiff ſhall pay the Coſts of the Day; and when he hath amended his Bill, and that the Party who was added, hath anſwered, and that the Plaintiff hath paid the Coſts of the Day, and hath proceeded upon the Amendment as to the other Defendants, (as is uſual on amending Bills) his Attorney may then, without producing the laſt Order, move of courſe, for Liberty to ſet down the Cauſe to be heard on Bill and Anſwer, as to the new-added Defendants, and to be further heard as to the former Defendants, and the Court will make an Order for that Purpoſe, and the Plaintiff is to ſerve this Order on the former Parties, four Days before the Day appointed for the Hearing, excluſive of the Day of Service, and is to ſerve the added Parties with *Subpœna* to hear Judgment, and

may then proceed to Hearing as uſual. *Sed Quær.* See *Moſeley's Reports*, 226, where it ſeems as if the former Defendants, muſt be again ſerved with *Subpæna* to hear Judgment. See *Title Hearing.*

The like on the Plea of Outlawry.

The Plaintiff may likewiſe ſet down his Cauſe to be further heard, after he hath reverſed the Outlawry, and paid the Coſts of the Day; and in either of theſe Caſes, the Coſts to be paid by the Plaintiff, is the ſame, as for not appearing on the Hearing. See *Title Diſmiſs.*

The Coſts in either Caſe.

On Want of proper Parties, the Bill may be diſmiſſed without Prejudice, and ſome Times the Court gives the Plaintiff Leave to amend.

Where a Bill wants proper Parties, it is in the Power of the Court, to diſmiſs the Bill without Prejudice, or to give Leave to amend paying Coſts. 1 *Peer Williams*, 428.

Plea in Bar, ſometimes ordered to ſtand for an Anſwer.

A Plea in Bar, as it goes to the Merits, and often cauſes a perpetual Diſmiſſion of the Bill, the Court will ſometimes order it to ſtand for an Anſwer. *Bac. Eq. Ca.* 37.

Fraud to be denied by Anſwer, and not by Plea.

And note, that if there be any Fraud alledged in the Bill, it muſt be denied by way of Anſwer, and not by way of Plea. 1 *Vern.* 185.

If Plaintiff replies to Defendant's Plea, he admits it to be

If the Plaintiff replies to the Deſendant's Plea, he thereby admits the Plea to be good, if it be true, and the Validity

lidity of the Plea, can never after be brought into Queſtion, but only the Truth of it, as the Defendant proves it, or the Plaintiff diſproves it; and if it ſhould not be ſo, no Plaintiff would ever ſet down any Plea to be argued, but would reply, and put the Defendant to the Charge of examining, and then conteſt the Validity of the Plea at the Hearing; and beſides, the Defendant would be prevented from making ſuch other Defence, as he might, by relying on his Plea. *Preced. in Cha.* 58.

good, and the Truth of it is then only in Queſtion.

If the Defendant obtains an Order for Time to anſwer, he may put in a Plea to the Bill, if the Order is not to anſwer only. 1 *Ch. Ca.* 279. 2 *Ch. Ca.* 208. *Moſeley's Reports*, 207. 1 *Vern.* 275.

A Defendant cannot plead, if he has an Order to anſwer only.

A ſecond Plea, for want of Parties, is not good; for at Law, if the Defendant pleads want of Parties, he muſt give the Plaintiff a good Writ; but ſuch a Plea cannot be ſuppreſſed on a Motion, but muſt be ſet down to be argued. *Moſeley's Rep.* 207.

A ſecond Plea for want of Parties, not good.

But cannot be ſuppreſſed on Motion.

By the 41ſt general Rule, *pars*, all Pleas, except Matter of Record, are to be ſworn to, except in the King's Attorney's Caſe, who anſwereth a Bill againſt the King; or a Corporation, who are ſued in the Name of their Corporation, and anſwer

RULE 41. Pleas to be upon Oath.

Exceptions to the Rule.

anſwer without Oath, under the Seal of their Corporation.

No dilatory Plea to be received but upon Oath, or probable Matter ſhewn.

And by 6 *Ann.* ch. 10. *pars*, no dilatory Plea ſhall be received in any Court of Record, unleſs the Party offering ſuch Plea do, by Affidavit, prove the Truth thereof, or ſhew ſome probable Matter to the Court, to induce them to believe, that the Fact of ſuch dilatory Plea is true.

How a Defendant is to plead, where the Diſcovery of a Deed is ſought.

It is ſufficient for a Defendant, in a Plea, to ſay, he does not know, or believe, as to the Fact, or Deed, of which a Diſcovery is ſought by the Bill. *Ayl.* 48. 1 *Har. Cha. Pract:* 3d Edit. 387.

Diſmiſſion not ſigned or inrolled if pleaded, it muſt be upon Oath.

If a Cauſe has been formerly diſmiſſed, and the Diſmiſſion not ſigned, or enrolled, if this be pleaded, it muſt be on Oath, for until the Inrollment, it is not recorded. *Ibid.*

Decree inrolled or not inrolled, pleadable.

A Decree, whether inrolled, or not inrolled, is pleadable. 1 *Vern.* 310.

Parties and Privies muſt ſhew the original Deed.

But Strangers may plead it without ſhewing it.

Parties and Privies ought to ſhew the original Deed, for every Deed ought to prove itſelf, and be proved by others; but Strangers to the Deed, and who do nothing in Right of the Grantee, as Bailiff, or Servant, may plead the Patent or Deed, without ſhewing it. *Treatiſe of Equity*, 124.

The

The Statute of Limitations, was pleaded to a Bill of Diſcovery, but it was over-ruled. *Bunb. Rep.* 60.

Statute of Limitations.

A Plea to the Diſcovery and Relief in a Bill, when the Bill prayed only a Diſcovery, was over-ruled. *Aſgill* againſt *Dawſon*, *Hillary Term*, 1720. *Bunb. Rep.* 70.

Plea to Diſcovery and Relief over-ruled.

In the Caſe of *Marſton* againſt *Claypole*, *Bunb. Rep.* 213. a Plea of the Statute of Limitations to a Bill for Tithes was over-ruled, *per totam Curiam*; for the Defendant, as to the Tithes, is in the Nature of a Receiver, or Bailiff, for the Plaintiff; in which Caſe, the Statute of Limitations does not operate.

Statute of Limitations not pleadable to a Bill for Tithes.

Some Rules and ſpecial Caſes, relating to Anſwers, Pleas, and Demurrers.

THE Party who intends to plead or demur, muſt firſt take Care that he is not guilty of Dilatories, for if he ſtands out Proceſs of Contempt, to a Commiſſion of Rebellion, he cannot then plead in Bar to the Bill, and his Plea ſhall be diſmiſſed upon that Suggeſtion.

A Defendant who intends pleading or demurring, is not to be guilty of Dilatories.

Whenever

When a Party may loſe the Benefit of pleading and demurring.

Whenever a Defendant hath prayed a *Dedimus*, or further Time to anſwer, it is not reaſonable he ſhould put in any Plea to the Juriſdiction of the Court, or in Diſability of the Perſon; for by praying Time, or a *Dedimus*, he hath ſubmitted to the Juriſdiction, and acknowledged the Court to make Enquiry into the Matters contained in the Bill, and allowed the Plaintiff a proper Perſon to call him to an Account for the Grievance he complains of in his Bill, and to be anſwered as to the Facts he there charges; ſo that if the Defendant will either plead to the Juriſdiction, or indiſability of the Perſon, he muſt do it before he prays Time to Anſwer, or a *Dedimus*.

RULE 41. Ibidem.

By the 41ſt general Rule, no Demurrer to the whole Bill, nor any Plea to the Juriſdiction of the Court, or Diſability of the Perſon, ſhall be received by *Dedimus*; nor any Plea or Demurrer at all admitted where the Defendant ſtands in contempt to a Commiſſion of Rebellion, without the ſpecial Order of the Court; and all Pleas, except Matter of Record, are to be ſworn, except in the King's Attorney's Caſe, who anſwereth a Bill againſt the King, or a Corporation, who are ſued in the Name of their Corporation, and Anſwer, without Oath, under the Seal of their Corporation.

Where-

Wherever a Defendant ſhall pray Time to Anſwer, he ſhall not demur alone, but ſhall return an Anſwer with the Demurrer. See 2 *Williams*, 464, where it is determined, that a defendant may plead (though he cannot demur), after Time given him to anſwer; for that a Plea is an Anſwer upon Oath. See *Bunb. Rep.* 74. where it is ſaid, the Defendant may plead and anſwer.

RULE 8th. *May* 1719. Ibidem.

When the Defendant hath loſt the Benefit of Pleading and Demurring, he can never in his Anſwer, inſiſt on any Dilatory; for a Court of Equity ſhould diſcountenance Delays in Suits, as much as poſſible; but wherever the Plea goes to the Right, there he may have the ſame Advantage by it, by Anſwer, as if he had pleaded.

When a Defendant may have the ſame Benefit of it by Anſwer, which he loſt of pleading and demurring.

As to Pleas in Bar, called peremptory Exceptions, which Bar will exclude the Action for ever, as a Plea of a Releaſe; an Accounted ſtated; or of a Purchaſe for a valuable Conſideration, without Notice, (but Notice muſt be denied) and ſuch like as aforeſaid; the Court ſeldom deprive the Party of the Benefit of them, though he ſhould run into Contempt; for theſe being all juſt and equitable Bars, it would be hard to preclude the Plaintiff of the Advantage of them, upon Account, perhaps, of ſome Neglect in

Pleas in Abatement, ſeldom admitted, where a Defendant is in Contempt, but it is otherwiſe as to Pleas in Bar.

in his Attorney, or Agent; wherefore, the Court, in thoſe Caſes, will give the Defendant leave to inſiſt on them, by way of Anſwer: But in Caſe of Pleas in Abatement, which are but dilatory, and temporary Bars, the Court do not uſually admit them to be received, if the Defendant runs into Contempt.

RULE 42. Pleas what to contain.

By the 42d general Rule, in the Concluſion of every Plea, (not containing Matter of Record, or referring thereunto) there muſt be an Averment, and as well Pleas, as Demurrers, are to expreſs the ſeveral Cauſes of ſuch Plea, or Demurrer, and to demand the Judgment of the Court.

RULE 43. Pleas, Demurrers and Exceptions to Reports, to be ſet down in four Days after filing, or to be over-ruled and diſcharged.

By the 43d general Rule, all Pleas, Demurrers, and Exceptions to Reports be ſet down, to be argued by the Attorney concerned, within four Days after filing thereof, on ſuch Day as the Officer ſhall appoint, or in Default of procuring the ſame to be ſet down and argued; the ſame is to be diſallowed by an Order to be taken out of courſe*, without Motion, and the Plaintiff may then take out Proceſs to enforce the Defendant to make an Anſwer, and to pay forty Shillings Coſt. And in caſe, upon hearing any ſuch Plea, or Demurrer, the ſame

* It is now practiſed to move the Court to diſcharge or over-rule the Demurrer, Plea, or Exceptions, upon a Certificate from the Officer, of their not being ſet down to be Argued.

ſame be over-ruled, the Defendant is to pay forty Shillings Coſts; but if allowed, he is to have forty Shillings Coſt. And where one Demurrer is allowed, a ſecond Demurrer may be put in, for a ſecond Cauſe.

Notice of filing the Plea or Demurrer to be given to the other Party.

And note, the Defendant's Attorney is to give Notice to the Attorney for the Plaintiff, of the Filing of ſuch Plea, or Demurrer, as in the Caſe of Exceptions to Anſwers, for the Reaſons mentioned under *Title Exceptions*.

Bill diſmiſſed, if Demurrer to the whole be allowed.

If a Demurrer to the whole Bill be allowed, the Bill is thereby totally diſmiſſed, and the Plaintiff muſt pay taxed Coſts; ſo of a Plea, unleſs the Plaintiff has Liberty to reply, and oblige the Defendant to prove his Plea, for Allowance thereof, is no more than adjudging it to be a good Bar.

The Coſt is but twenty Shillings, if Plaintiff allows the Plea or Demurrer within the four Days.

If the Plaintiff allows the Plea, or Demurrer, within the four Days, without putting the Party to Expence, the Coſt is but twenty Shillings, and the Plaintiff's Attorney may then move to diſmiſs the Plaintiff's Bill.

The Order for arguing the Plea or Demurrer to be ſerved.

When a Plea, or Demurrer, is entered to be argued, the Order ought to be ſerved, on the adverſe Party, four Days before the Day appointed for Hearing.

All

Pleas and Demurrers, to be ſigned by Counſel, and Demurrers may be filed without Oath.

All Demurrers and Pleas are to be ſigned by Counſel, and Demurrers may be filed without Oath.

Pleas often ordered to ſtand over to Hearing, but not Demurrers.

The Benefit of a Demurrer is never ſaved to the Hearing, but a Plea is often ordered to ſtand over as proper to be determined at the Hearing. *Moſeley's Rep.* 228. See 1 *Vern.* 282, *Cont.*

Bill diſmiſſed on Demurrer, no Bar to a new Bill, if Coſts to be paid. Plaintiffs may amend.

If Plaintiff, upon a Demurrer put in, pay the common Coſts, and diſmiſſes his own Bill, this is no Bar to a new Bill. 1 *Ch. Ca.* 208. or he may amend his Bill; but if the Demurrer be ſet down to be argued, he muſt pay the Coſts of the Demurrer. *Moſeley's Rep.* 301.

Demurrer aſſigned at the Bar, after a Demurrer filed, Coſts to be paid.

If after a Defendant hath filed a Demurrer to the Plantiff's Bill, he ſhall, at the Bar, aſſign another Cauſe of Demurrer, he ſhall pay Coſts for aſſigning the ſame; and if both be over-ruled, he muſt pay double Coſt: But note, if the Defendant puts in a Plea, without a Demurrer, he cannot afterwards demur at the Bar.

No Demurrer at the Bar, after a Plea.

Defendant by anſwering to the ſame Matter to which he pleads, overrules the Plea.

It is a Rule in Equity, that the Anſwer over-rules the Plea, where the Defendant anſwers to the ſame Thing, he inſiſts upon by his Plea, for he ought not to anſwer it. Earl of *Clanrickard* againſt *Buck*, 1717. 1 *Har. Ch. Pr.* 3d Edit. 387.

A Plea of Outlawry if it be in any Suit for that Duty touching which Relief is ſought, is inſufficient, and Plaintiff may take out Proceſs to inforce a better Anſwer. *Ibidem* 388.

Plea of Outlawry, if in that Suit for the Duty touching which, Relief is ſought, is inſufficient.

A parol Agreement is deſtroyed by Writing, and Defendant need not anſwer, but plead the Statute of Frauds. *Ibidem.*

Parol Agreement deſtroyed by Writing, and Defendant may plead the ſtatute of Frauds.

If Outlawry or other Matter be pleaded, and the Plea is over-ruled on arguing it, no other Plea ſhall be afterwards pleaded, but the Defendant muſt anſwer. *Ibidem*, 389.

Plea over-ruled on arguing, no ſecond Plea, Defendant muſt anſwer.

But if by the Defendant's Overſight, Neglect, or Default in not attending, his Plea is over-ruled, the Court on Motion in Time, will order it to be re-argued, the Defendant paying the Coſts of Overruling. *Ibidem.*

But if over-ruled by Defendant's Overſight or Default, it may be re-argued on Payment of Coſts.

When a Matter is pleaded, that is not of Record, and the Plaintiff deſires to have the Opinion of the Court, whether allowing the Matter to be true, it be a ſufficient Bar to the Suit, it muſt be argued; and in this Caſe, if the Court be of Opinion with the Plea, the Plaintiff is to take Iſſue, whereupon, the Defendant muſt make Proof of the Truth of his Plea by Depoſitions, *&c.* as in caſe of Anſwer. *Ibidem.*

Though Plea, if not of Record, may be proved by Depoſitions.

Huſband cannot demur for his Wife.

Huſband alone cannot demur for his Wife. *Ibidem*, 396.

Demurrer to a Bill of Review if diſallowed, ſhall not be inrolled, to prevent its being re-argued.

Where a Demurrer to a Bill of Review is allowed, it may be inrolled; but if diſallowed, it ſhall not be inrolled, to prevent the Demurrer being re-argued. 2 *Vern.* 120.

Attachment for want of an Anſwer, where Defendant on ſpecial Application got Time to anſwer, and demurred alone.

The Defendant made Oath that he could not anſwer without Sight of Evidences in the Country, and having Time given him to put in his Anſwer, a Demurrer was put in, yet an Attachment went for want of an Anſwer againſt him. *Cary's Rep.* 110.

A Plea and Demurrer not to be put in to the Bill at the ſame Time, on the ſame Point of the Bill.

There ſhall not be a Plea and Demurrer at the ſame Time to the Bill, on the ſame Point of the Bill; becauſe, if the Demurrer be over-ruled, the Defendant muſt anſwer, and cannot have the Benefit of his Plea; for the Court, upon over-ruling of the Demurrer, does of courſe rule that the Defendant ſhould conteſt and anſwer; but if a Demurrer only be put in, and the Demurrer be allowed, and the Plaintiff thereupon amends his Bill, ſuch amended Bill, is a new one, and then the Defendant may plead, *de novo*.

If a Plaintiff replies to a Plea before it comes on to be argued, this is as full an Admiſſion of the Plea, as if it had been argued and allowed; for the Plea, by this Replication, is allowed to be good, only the Defendant is put to the Proof thereof, and ſo he may be, when it is argued and allowed; but if he proves his Plea, the Bill muſt be diſmiſſed at the Hearing.

If a Plaintiff replies to a Plea, it is as full an Admiſſion of the Plea, as if argued and allowed.

By the 44th general Rule, if all the Cauſes of Demurrer expreſſed, be diſallowed, and yet the Demurrer ſhall be allowed for ſome other Cauſe, not expreſſed in the Demurrer; in that Caſe, the Plaintiff ſhall nevertheleſs pay Coſts.

RULE 44. Demurrer allowed for Cauſes not expreſſed, the Plaintiff ſhall pay Coſts.

But in the Caſe of *Durdant* againſt *Redman*, 1 *Vern.* 78. it was held that where a Defendant has demurred, he may aſſign another Cauſe of Demurrer at the Bar, paying Coſts; and if ſuch Cauſe of Demurrer is over-ruled, he ought to pay double Coſts; but where a Defendant has pleaded, and there is no Demurrer in Court, he cannot demur at the Bar, though he would pay Coſts. See *Bunb. Rep.* 141.

Another Cauſe of Demurrer may be aſſigned at the Bar, but not when the Defendant has pleaded.

If a Demurrer is brought for a Slip or Miſtake in the Bill, and that the Plaintiff allows the ſame in the four Days, and pays 20*s.* Coſts as aforeſaid, the

Demurrer for a Slip or Miſtake in the Bill, if Plaintiff allows the Demurrer, he may amend his Bill.

Plaintiff's Attorney, may then, upon Motion of courſe, obtain an Order for Liberty to amend his Bill. See 2 *Will.* 300.

Plea or Demurrer allowed or proved, Bill to be diſmiſſed with Coſts.

Where a Plea or Demurrer is put into the Bill, and the Plea allowed or proved, and the Demurrer allowed, the Bill is to be diſmiſſed with Coſts.

Demurrer by Commiſſion without Anſwer, no Coſt to be paid, though Demurrer be allowed.

But if a Demurrer comes in by Commiſſion without any Anſwer, in ſuch Caſe the Defendant ſhall have no Coſt, although the Demurrer be allowed. 1 *Vern.* 282.

A Defendant not obliged to anſwer Matters that may criminate him, or ſubject him to Penalties.

In the Caſe of Lord *Howth* againſt Lady *Howth* in *Chancery*, a Bill was filed by the Plaintiff, againſt, the Defendant, his Mother and Guardian, and Executrix of his Father, for an Account of the Plaintiff's real Eſtate, during his Minority, and for the perſonal Fortune of his Father, and charging, that Defendant had, ſince his Father's Death, intermarried with one *Nicholas Weldon*, Eſq; and praying a Diſcovery thereof.

The ſaid *Nicholas Weldon* being a Papiſt, the Defendant, Lady *Howth*, pleaded the Statute 9 *Will.* 3. which Plea being argued, although the Plaintiff, by his Bill, claimed a Matter to which he had a Right, quite independant of the Statute, and therefore inſiſted he had a Right

Right to her Anſwer, as to her Marriage, as otherwiſe he could have no Certainty, though he ſhould obtain a Decree againſt her; and that her having tranſgreſſed the Laws by marrying a Papiſt, ſhould not put her in a better Condition than if ſhe had not, and to the Prejudice of another, who did not claim any Right upon that Statute; yet after a moſt ſolemn Debate of the Matter, Lord Chancellor, as there was no Precedent exiſting, where a Perſon was compelled to anſwer any Matter that might ſubject him to Penalties, allowed the Plea, but at the ſame Time declared, that he could wiſh the Senſe of another Place was taken, on the Determination he had made. See *the Order on arguing the Plea in this Cauſe, Trinity Term* 1752; and alſo, *the Order made on arguing Exceptions to the Maſter's Report of a ſhort Anſwer in the ſaid Cauſe, the 11th of* March, 1755.

Though there be an Anſwer to the original Bill, yet if it be afterwards amended, there may be a Demurrer to the amended Part. *Bunbury*'s *Reports*, 120.

Though Anſwer be to the original Bill, yet a Demurrer may be to the Amendment.

Of anſwering over, after the Plea or Demurrer is adjudged or diſpoſed of.

RULE. Exceptions to an Anſwer, in which the Defendant pleads or demurs, after ſuch Plea or Demurrer is adjudged.

BY the latter Part of the 24th general Rule, no Exceptions ſhall be taken to an Anſwer, where the Defendant in the ſame Anſwer, pleads or demurs, until ſuch Plea or Demurrer be firſt adjudged; and after ſuch Adjudication, the Plaintiff ſhall have the uſual Time for taking Exceptions.

The Conſtruction of this Part of the Rule is to be conſidered in two Caſes.

Plea or Demurrer over-ruled, Defendant to anſwer over.

Firſt, Where the Demurrer or Plea is to Part of the Bill, and that ſuch Demurrer or Plea is over-ruled, the Defendant is to anſwer over to ſuch Part of the Bill, ſo demurred or pleaded to; for the over-ruling of ſuch Plea or Demurrer, is adjudging by the Court, that the Defendant ſhall anſwer ſuch Part ſo intended to be covered.

But not until Exceptions are filed to the Anſwer.

But obſerve, that though the Demurrer or Plea be over-ruled, and the Defendant is to anſwer over, yet not until the Plaintiff hath filed Exceptions to the Anſwer.

The

The latter Part of the 24th general Rule does not directly ſay, that after Adjudication, the Plaintiff ſhall except, before the Defendant ſhall be held to anſwer over. Explanation of the latter Part of the 24th general Rule.

But in ſuch latter Part of the 24th Rule, it is expreſly ſaid, that Exceptions ſhall not be taken to the Anſwer, until the Plea or Demurrer be firſt adjudged. Now, this muſt be, in caſe the Plaintiff apprehends the other Parts of the Anſwer, not intended to be covered by the Demurrer or Plea, to be ſhort, which therefore I take to be the Reaſon; Firſt, that the Exceptions ſhall not be taken until after Adjudication; becauſe, that if, before Adjudication, Exceptions were taken, and the Defendant to anſwer over to ſuch Exceptions; then if the Adjudication ſhould go againſt the Defendant, he muſt alſo anſwer over to the Point demurred to. Secondly, that after Adjudication, the Defendant is not held to anſwer over to the Point demurred to, until the Plaintiff file his Exceptions; becauſe otherwiſe, the Defendant might be alſo made unneceſſarily to anſwer over twice. Thus, if the Defendant, of courſe, were to anſwer over to the Point demurred to, and even anſwered it full, then the Plaintiff might file Exceptions to ſuch other Parts of the Anſwer, as were really ſhort; whereas, if the Plaintiff after the Adjudication, takes Exceptions, there the Defendant, Ibidem.

may at once, anſwer over to all the Points excepted to.

After Plea or Demurrer allowed, Plaintiff may except to the Anſwer.

Secondly, Where the Demurrer or Plea is allowed, yet this ſhall not cover any other Part of the Anſwer, which is ſhort; but after ſuch Allowance, the Plaintiff may take Exceptions to any other Parts of the Anſwer, not covered by the Plea or Demurrer.

Time for excepting after Adjudication of the Plea or Demurrer againſt the Defendant.

In the firſt Caſe, the Plaintiff has the ſame Time from Adjudication to file Exceptions, as in caſe of an Anſwer, where there is no Demurrer or Plea; if he comes within that Time, Exceptions are to be filed of courſe, if not, Plaintiff's Counſel muſt move for Leave to file them.

Exceptions to the Anſwer after the Plea or Demurrer is allowed.

In the ſecond Caſe, Plaintiff's Counſel muſt apply to the Court, for Liberty to take Exceptions to the Anſwer, as to it's being ſhort to the Points not pleaded or demurred to; for without a ſpecial Order, they cannot be received, though offered the Day after the Plea or Demurrer is allowed; but this is generally made a Part of the Order, on allowing the Plea, and that is the regular Way.

Anſwer to Part, and Plea to all other Matters not anſwered unto, if the Plaintiff may except to the Anſwer.

In the Caſe of *Darnell* againſt *Reyney*, 1 *Vern.* 344. it is held, that where the Defendant anſwers to Part, and pleads to all other Matters not anſwered unto, the Plaintiff

Plaintiff cannot put in Exceptions to the Anſwer, until he has firſt argued the Plea, or obtained an Order that the Plea ſhall ſtand for an Anſwer, with Liberty to except to the Matters not pleaded to.

When a further Anſwer is required before Exceptions put in, and when not.

And in the Caſe of *Coates* and *Turner*, *Bunb. Rep.* 123. *per Curiam*, where a Plea or Demurrer is over-ruled upon Hearing, and the Defendant anſwers, alſo (even by only denying Combination) the Defendant is not obliged to put in a further Anſwer, until the Plaintiff has put in Exceptions for that Purpoſe; but if the Demurrer is to the whole Bill, and over-ruled, the Defendant muſt anſwer according to the Rules of the Court, without Exceptions put in by the Plaintiff.

Of anſwering, pleading, and demurring to the ſame Bill.

Demurrer, Plea, and Anſwer to the ſame Bill.

THERE may be a Plea to one Part of the Plaintiff's Bill, a Demurrer to another Part, and an Anſwer to the Reſidue. But you cannot demur and plead at the ſame Time, to the Bill, on the ſame Point of the Bill; becauſe, if the Demurrer be over-ruled, the Defendant muſt anſwer, and cannot have the Benefit of his Plea; for the Court upon

upon over-ruling the Demurrer, does of courſe rule that the Defendant ſhould conteſt and anſwer; but if a Demurrer only be put in, and the Demurrer be allowed, and the Plaintiff thereupon amends his Bill, ſuch amended Bill, is a new Bill, and then the Defendant may plead *de novo*.

Defendant cannot plead after a Proclamation returned.

The Defendant had pleaded a former Decree in Bar, to the Plaintiff's Bill, but the Plea was not ſuffered to be opened; for that it came in after a Proclamation returned, and alſo came in by a general Commiſſion, which was to take the Anſwer only, and not plead, anſwer, or demur. Between *Loyd* and *Gunter*, 1 *Vern.* 275. See the 41*ſt general Rule.*

Nor can a Plea be taken upon a general Commiſſion to take the Anſwer only.

Where a Perſon may waive his Plea.

Defendant, as to Part, pleads Pendency of a former Suit, and then anſwers to Part, and denies all the Fraud charged on him by the Bill: Plaintiff replies generally to the Anſwer, without taking Notice of the Plea, and Witneſſes were examined on both Sides, and the Cauſe heard, and a Trial at Law directed, which went againſt the Defendant, who petitions for a Rehearing, and on the Rehearing, the Defendant inſiſted that the Plaintiff had been utterly irregular in his Proceedings, for not ſetting down the Plea to be argued, and diſpoſed of by the Court before he replied; for the Plaintiff himſelf cannot take upon him

him to over-rule it, be it what it will, but muſt bring it for Judgment before the Court, and for want of that, all was irregular, and ought to be ſet aſide; but the Lord Keeper, and Maſter of the Rolls, were both of Opinion, that the Defendant, by thoſe Proceedings, had waived his Plea, and therefore the Proceedings were regular, ſo that the Cauſe went on, and the former Decree was affirmed. *Mich.* 1701, between *Lucas* and *Holder*, *Bac. Eq. Ca.* 41.

Defendant after demurring, may aſſign another Cauſe of Demurrer at the Bar, paying Coſts.

Where a Defendant has demurred, he may aſſign another Cauſe of Demurrer at the Bar, paying Coſts; and if ſuch Cauſe of Demurrer is over-ruled, he ought to pay double Coſts: But where a Defendant has pleaded, and there is no Demurrer in Court, he cannot demur at the Bar, though he would pay Coſts. Between *Durdant* and *Redman*, 1 *Vern.* 78.

But cannot demur at the Bar, if there be only a Plea.

Demurrer ſet aſide where the Defendants had Leave to anſwer, plead and demur, but not to demur alone, and anſwered only by denying Combination or ſome ſuch trifling Matter.

A Bill was filed to ſet aſide a Will, and to ſtay the *Probat* thereof; the Defendants had an Order to plead, anſwer, and demur, but not to demur alone; the Defendants, as to Part of the Bill, demurred to the Juriſdiction, and for Anſwer ſaid, that they did not know, that the Plaintiffs were the half Brothers and Siſters of the Teſtatrix, and denied Combination; the Demurrer was on Motion

tion diſcharged, for that the Defendants had not complied with the Order, for in Effect they had demurred alone, for denying Combination was nothing; and ſaying that they did not know, that the Plaintiffs were half Brothers and Siſters, was immaterial, and in effect no Anſwer. 2 *Williams*, 286.

Demurrer over-ruled by the Anſwer.

The Defendant having demurred, for that the Plaintiff had made no Title to himſelf in the Bill (as in Truth he had not) it was inſiſted that the Defendant had over-ruled his own Demurrer, by having anſwered over to ſeveral Parts of the Bill; but the Matter of Fact being denied, and there being no Books in Court, the Matter was adjourned. 1 *Vern.* 90.

Demurrer without an Anſwer by Commiſſion, Defendant ſhall have no Coſt, though Demurrer allowed.

Demurrer allowed, but without Coſts, becauſe it was a Demurrer, only without an Anſwer, and came in by Commiſſion. *Ibid.* 282.

If the Defendant demurs, becauſe the Bill contains ſeveral diſtinct Matters againſt ſeveral Defendants, he muſt, by Anſwer, deny Combination, if charged by the Bill.

The Defendant demurred, becauſe the Plaintiff's Bill was brought againſt ſeveral Defendants, for ſeveral diſtinct Matters; the Demurrer was over-ruled, becauſe the Plaintiff by his own Bill, had charged the Defendants with Combination, which the Defendant had not denied by Anſwer. *Ibid.* 416.

But if he anſwers farther than by denying

But if by Anſwer, the Defendant doth more than barely deny Combination and Confederacy,

Confederacy, he over-rules his Demurrer. *Vern.* 463.

Combination, he over-rules his Demurrer.

Where there are Matters alledged in the Bill, to which the Bar of the Plea or Demurrer reaches not, or ſome Circumſtances relating to the Matter in Bar, that requires a particular Anſwer, as Fraud, *&c.* the Defendant muſt anſwer upon Oath as to thoſe, and then ſo much as goes in Bar, is relied on by Plea or Demurrer; and this is intitled, *The Plea and Anſwer of the Defendant*, or *the Anſwer and Demurrer of the Defendant*; or, *the Anſwer, Plea, and Demurrer of the Defendant*, as the Caſe is.

Directions for anſwering and pleading, or anſwering, pleading, and demurring, at the ſame Time.

In the Caſe of the Corporation of *Scarborough* againſt *Jackſon*, *Bunb. Rep.* 251. although the Defendant was in Contempt, yet the Court gave him Leave to plead, anſwer, and demur; and the ſame Day it was declared *per Curiam*, that for the future, where the Defendant, being in Contempt, prays Time to anſwer; if it is granted, he ſhall enter his Appearance with the Regiſter, as upon a Contempt. *Ibid.* 291.

Leave given to Defendant in Contempt to plead, anſwer, and demur.

But he muſt enter his Appearance.

Appeals.

Appeals.

Appeal to the House of Lords of *Great-Britain*, from a Decree in *Ireland*.

THERE are two Ways of reverſing Decrees of this Court; the one by Bills of Review in the ſame Court, hereafter treated of; the other by * Appeals to the Houſe of Lords of *Great-Britain*: And though when the Decree is to be reverſed by a Bill of Review, the Matter aſſigned for Error, muſt appear in the Decree itſelf; yet when you proceed by

The Original of Appeals to the Houſe of Lords in *England*.

* Towards the latter End of the Reign of King *Charles* Iſt. the Houſe of Lords of *England*, aſſerted their Juriſdiction of hearing Appeals from the *Chancery*, which they do upon a Paper Petition, without any Writ directed from the King; and for this their Foundation is, that they are the Great Court of the King, and that therefore, the *Chancery* is derived out of it, and of Conſequence, that a Petition will bring the Cauſe and the Record before them. This was long controverted by the Commons, but is now ſubmitted to, becauſe it has been thought too much, that the Chancellor ſhould bind the whole Property of the Kingdom without Appeal.

The Original of the Appeals from *Ireland* to *England*.

They alſo hear and determine all Appeals from this Kingdom, the Juriſdiction of the Peers of *Ireland* having been taken away by an *Engliſh* Statute, in the ſixth Year of the Reign of King *George* the firſt, in Conſequence of an Appeal to the Houſe of Lords of *Great-Britain*, from a Decree of the Houſe of Lords in *Ireland*, in the Cauſe of *Sherlock* and *Anneſley*, in the Year 1717, which was the firſt Appeal brought from this Kingdom to *England*, and was adviſed by *Jeffrey Gilbert*, Eſq; then Lord Chief Baron of this Court.

by Appeal in Parliament, any Matter may be aſſigned therein, although not appearing in the Decree.

If either Party thinks himſelf aggrieved by a Decree, he may, by Petition, appeal to the Lords in Parliament of *Great-Britain*, and have the Cauſe reheard there, and they will affirm, alter, or reverſe the Decree, as they ſee fit.

And they will affirm, alter, or reverſe it, as they ſee fit.

And, by a printed Order of the Houſe of Lords of *England*, the 16th of *July* 1678, this Petition of Appeal is to be preſented within fourteen Days, to be accounted from the firſt Day of every Seſſion or meeting of Parliament after a Receſs; after which Time it will not be received, unleſs it be upon a Decree made whilſt the Parliament is actually ſitting; in which Caſe the Party who ſhall find himſelf aggrieved, may bring his Petition of Appeal, provided he preſent it to the Houſe within forty Days after ſuch Decree is made, and entered in any of the Courts of *Equity* in *Ireland*.

Certain Time limited for bringing in Appeals.

The Houſe of Lords, upon Motion of Counſel for the Appellant, will order the Appeal to be received, and will appoint a Day for hearing the Cauſe; and the Attorney, or Agent for the oppoſite Party, in this Kingdom, is to be ſerved with a Copy of the Order, and a Summons to appear, *&c.* and the Reſpondent is ordered

Order for receiving the Appeal, to be ſerved on the Attorney or Agent for the oppoſite Party in *Ireland*.

ordered to have a Copy of the Appeal; but the Solicitor in *England*, whom the Appellant employs to tranſact the Appeal with the Houſe of Lords, uſually ſends over all the neceſſary Inſtructions to the Agent or Attorney in this Kingdom.

Appeals to be ſigned by two Counſels, and one of them is to attend at the Bar of the Houſe on the Hearing.

And by an Order of the ſaid Houſe, the 3d of *March* 1697, the Appeal is to be ſigned by two Counſels in *England*; and no Perſon whatſoever is to preſume as Counſel, to ſign the Appeal, unleſs he ſhall attend, as Counſel at the Bar of the Houſe, when the Appeal ſhall come on to be Heard.

Printed Caſes to be ſigned by Counſel and diſtributed to the Lords.

And by an Order, 19th *April* 1698, no Perſon whatſoever, is to preſume to deliver any printed Caſe, or Caſes, to any of the Lords of the Houſe, unleſs ſuch Caſe or Caſes, ſhall be ſigned by one or more of the Counſel, at the Hearing of the Cauſe in the Houſe: And by an Order of the 18th *December* 1724, printed Copies of the Appellant's, and alſo of the Reſpondent's Caſe, are to be delivered to the Clerk of the Parliament, or Clerk aſſiſtant, to be diſtributed to the Lords of the Houſe, at leaſt two Days before the Hearing of the Appeal; and no other, or different Caſes in any ſuch Cauſes, are at any Time after to be printed or delivered.

An

And by an Order 22d *December*, 1703, when the Day for hearing of the Appeal is appointed by the Lords, it is not to be altered, but upon Petition; and no ſuch Petition is to be received, unleſs two Days Notice thereof be given to the adverſe Party; of which Notice, Oath is to be made at the Bar of the Houſe.

Day of Hearing not to be put off but on two Days Notice.

And by an Order of the Houſe of Lords of *Great-Britain*, 26th *January*, 1710, the Party or Parties Appellants, ſhall within eight Days after the Appeal is received, give Security to the Clerk of the Parliament by Recognizance to the Crown, of the Penalty of one Hundred Pounds, conditioned to pay ſuch Coſts to the Defendant or Defendants, in ſuch Appeals, as the Houſe of Lords ſhall appoint, in caſe the Decree appealed from ſhall be affirmed. And if the Appellant or Appellants ſhall neglect, or refuſe to give ſuch Security within the Time aforeſaid, that then the Clerk of the Parliaments ſhall inform the Houſe thereof, and the Appeal from thenceforth be diſmiſſed.

Recognizance on Appeals to be entered into in eight Days, or Appeals to be diſmiſſed.

And by an Order of the ſaid Houſe, 29th *March*, 1720, all Appeals that ſhall be preſented in any Seſſion, to which Anſwers ſhall be put in during the ſame Seſſion, and not determined in ſuch Seſſion; if neither the Appellant nor Re-

Appeals to which Anſwers are put in, not determined in the ſame Seſſion, to be brought on in eight Days after the beginning of the next Seſſion.

ſpondent ſhall apply to the Houſe within eight Days, to be accounted from and after the firſt Day of the next Seſſion or meeting of Parliament, for a Day for a Hearing, ſuch Appeals ſhall ſtand diſmiſſed; but without Prejudice to the Appellants preſenting any new Appeals thereafter, as they ſhall be adviſed. *Sed vide*, Order 5th of *April*, 1734, *poſt*.

The Time, where Anſwers are not put in during the ſame Seſſions.

And by an other Order of the ſaid 29th *March*, 1720, all Appeals that ſhall be preſented in any Seſſion, to which no Anſwer ſhall be put in during the ſame Seſſion, if neither the Appellant within eight Days, to be accounted from and after the firſt Day of the next Seſſion, or meeting of Parliament, ſhall apply to this Houſe to appoint a peremptory Day to Anſwer, nor the Reſpondent put in an Anſwer within the ſaid eight Days, ſuch Appeals ſhall ſtand diſmiſſed, but without Prejudice to the Appellant's preſenting any new Appeals thereafter, as they ſhall be adviſed.

The Proceedings in Caſe the Seſſion expires, before the Time limited for anſwering the Appeals is expired.

And by an Order of the 28th *March*, 1735, where an Order ſhall be made, for the Reſpondent or Reſpondents to anſwer the Appeal by a Time limited, if the Seſſion of Parliament wherein ſuch Order hath been, or ſhall be made, ſhall determine before the Time ſo limited for anſwering ſhall be expired, and no Anſwer ſhall be put in during the ſame Seſſion, Service of ſuch Order, upon

upon the Reſpondent or Reſpondents, to ſuch Appeal, by the Space of five Weeks at the leaſt, before the firſt Day of the next ſucceeding Seſſion, ſhall be deemed good Service; and the Appellant may apply to the Houſe for a peremptory Day for putting in the Anſwer; in caſe the Reſpondent or Reſpondents ſhall not put in his or their Anſwer within three Weeks, to be computed from the firſt Day of the ſaid next Seſſion of Parliament.

The Number of Years limited for bringing Appeals.

And by an Order, of the 24th of *March*, 1725, no Appeal, from any Decree or Sentence, will be received by the Houſe of Lords after five Years, from the Time of ſigning and inrolling, or extracting of ſuch Decree or Sentence, and the End of fourteen Days, to be accounted from and after the firſt Day of the Seſſion, or meeting of Parliament next enſuing the ſaid five Years, unleſs the Perſon intitled to ſuch Appeal be within the Age of Twenty-one Years, or *Covert*, *non compos Mentis*, impriſoned, or out of *Great-Britain*, or *Ireland*; in which Caſe, ſuch Perſon ſhall and may be at Liberty to bring his Appeal for reverſing any ſuch Decree or Sentence, at any Time within five Years after full Age, Diſcoverture, coming of ſound Mind, Enlargement out of Priſon, or coming into *Great-Britain* or *Ireland*, and fourteen Days, to be accounted from and after the firſt

Saving for Infants *Feme Coverts*, Perſons *non compotes*, impriſoned, or beyond the Seas.

Day of the Seſſion, or Meeting of the Parliament next enſuing the ſaid five Years, but not afterwards, or otherwiſe.

How Counſel are to proceed at the Hearing of Cauſes.

And by an Order of the Houſe 2d *March*, 1727, on the Hearing of Cauſes on Appeals, one of the Counſel, for the Appellants, ſhall open the Cauſe, then the Evidence on their Side ſhall be read; which done, the other Counſel for the Appellants may make Obſervations on the Evidence; then one of the Counſel for the Reſpondent ſhall be heard, and then the Evidence on their Side is to be read, after which the other Counſel for the Reſpondent is to be heard; and only one Counſel for the Appellants to reply.

Appeals to be heard in Courſe, as they ſtand appointed.

And by an Order of the 5th of *April*, 1734, where any Appeal ſhall be preſented, and a Day appointed for the Hearing thereof, in any Seſſion of Parliament, and that the ſame ſhall not be heard in the ſame Seſſion, it ſhall be heard and determined in the Beginning of the next ſucceeding Seſſion, in the ſame Order and Courſe, as it ſtood at the End of the former Seſſion, without any new Application to the Houſe, to appoint a Day for Hearing of the ſame. And ſuch Appeal that ſhall ſtand firſt, is to be heard upon the firſt *Monday* after the firſt Day of the ſaid next ſuc-

ſucceeding Seſſion, or Meeting of Parliament, the ſecond upon the *Wedneſday*, the third upon the *Friday* following, and from thence, the reſt in Courſe, upon every *Monday*, *Wedneſday*, and *Friday*, until they ſhall be all heard and determined.

The Lords will alter or affirm the Decree on Hearing.

After hearing of Counſel on the Appeal, and upon the Anſwer, on due Conſideration thereof, the Lords order and adjudge, That the Decree be varied in ſuch Matters as their Lordſhips think fit, or that the Petition and Appeal be diſmiſſed, and the Decree affirmed with Coſts, *&c.* and a Majority of the Lords finally determines the Cauſe. And an atteſted Copy of this Order is to be brought over to this Kingdom by ſome Perſon who has compared the ſame with the Original, and has ſeen it atteſted, and upon an Affidavit thereof, and on Counſel's Motion thereon, this Court will order, that the Order of the Lords of *Great-Britain*, be received and made an Order of the Court.

And the Order of the Lords is to be made an Order of this Court.

Iſſue at Law ſometimes directed.

Sometimes the Houſe of Lords direct an Iſſue at Law, for Trial of ſome Point neceſſary between the Parties, and after ſuch Trial, to reſort back to the Court where the Cauſe was heard, for their further Directions in the Matter.

Pleadings, &c. to be produced and proved at the Hearing of the Appeal.

And note, atteſted Copies of all the Pleadings, Evidences, and Proofs, which were made Uſe of on the Hearing of the Cauſe, in the Court where the Decree appealed from was pronounced, with an atteſted Copy of the Decree, are to be ready to be produced at the Hearing before the Lords; and ſome Perſon is to attend therewith, who can prove that he compared the ſame with the Originals in the Office, and that the Copies are true, and that he ſaw the ſame atteſted by the proper Officer.

On Appeals no new Matter is to be inſiſted on.

Upon an Appeal to the Houſe of Lords, no new Matter, not in iſſue in the Cauſe below, is to be ſuffered or inſiſted on; nor are any Proofs to be read, which were not made uſe of in the Court below. *Preced.* in *Ch.* 212. 295.

An Appeal brought, ſuggeſting the Decree made by Conſent, when it was not, diſmiſſed.

Sir *George Downing* brought an Appeal in the Houſe of Lords, from a Decree made in the Court of *Chancery*, by Conſent, ſuggeſting, that tho' the Regiſter, in drawing up the Order, had drawn it as a Decree by Conſent, (and the Minutes were ſo too) yet he never did conſent to ſuch Decree, nor his Counſel neither, or if he did, it was without his Authority, and made Affidavit of it, but the Appeal was diſmiſſed. *Hillary*, 1699, between *Downing* and *Cage*. *Bac. Equ. Ca.* 165.

In

In the Caſe of *Howard* againſt *Colley*, it was ruled, that, on an Appeal, the whole Caſe is open; but on a Rehearing, only ſo much as is petitioned againſt: And if all Parties do not petition, it is only open to the Petitioners. *Trin.* 11. *Geo.* 1. 2 *Har. Cha. Pract.* 3d Edit. 87. See 1 *Williams*, 300.

On an Appeal the whole Caſe is open, but on a Re-hearing only ſo much as is petitioned againſt, and it is only open to the Petitioners.

Matters of Account, admitted before the Maſter, ſhall never be allowed upon an Appeal. *Chatham ver. Leigh*, 1705. and Mayor, *&c.* of *Hertford*, *ver.* the Poor of the ſame Town, 1713. 2 *Har. Chan. Pract.* 3d Edit. 87.

Matters of Account, admitted before the Maſter, not allowed on the Appeal.

No Appeal lies for Coſts only. *Carr*, *ver. Parrall*, 1727. *Ibidem.*

No Appeal for Coſts only.

None but they who are Parties to the Suit, are intitled to an Appeal. *Vill ver. Lane*, 1726. *Ibidem.*

None but Parties intitled to an Appeal.

The Parliament being prorogued, it was declared by the Court, that the Account in *Chancery*, might be proceeded on, notwithſtanding the Appeal. 1 *Vern.* 344. *Popham* againſt *Bampfield.*

The Account may be proceeded on in *Chancery* notwithſtanding the Appeal.

Appeal to the Houſe of Lords from a Decree in *Chancery*, and upon the Petition of the Appellants, to examine Witneſſes in the Cauſe, it was rejected, and the Petition diſmiſſed: The Appellants

No Witneſs to be examined on an Appeal.

then brought a Bill of Review, and it was decreed, Defendants ſhould anſwer and demur. *Finch.* 468. 1 *Vern.* 443.

No Depoſitions read on the Hearing, to be read on the Appeal.

No Depoſitions are to be read, on an Appeal to the Lords, but ſuch as were read at the Hearing of the Cauſe.

A Bill of Appeal lies from an inferior Court to the Court of *Chancery.*

In the Caſe of *Addiſon* againſt *Hindmarſh*, *Hillary* Term, 1686, 1 *Vern.* 443, Lord Chancellor ſeemed to incline, that a Bill of Appeal would lie from an Inferior Court to the Court of *Chancery*; as at common Law, the *King's-Bench* corrects all inferior Courts. *Ibidem.*

But on ſuch an Appeal from an inferior Court, you need not aſſign particular Errors, as on a Bill of Review.

But note, in a Bill, by way of Appeal, from an inferior Court, the Plaintiff therein muſt complain of the Injuſtice done him by the inferior Court; but is not obliged to aſſign any particular Errors; which is the Difference betwixt a Bill of Appeal, and a Bill of Review: But in this, they both agree, *viz.* that both muſt be upon the ſame Evidence; and you cannot examine *de Novo*; tho' in the Spiritual Courts, they examine over and over again, and proceed upon new Allegations. 1 *Vern.* 443.

You can't examine *de Novo* upon either.

No Appeal to the Houſe of Lords from a Sentence of the Delegates, nor from a Decree upon the Statute of Charitable Uſes.

No Appeal lies to the Houſe of Lords, from a Sentence in the Delegates, nor from a Decree, on the Statute of Charitable Uſes; for here they cannot have any original Juriſdiction, becauſe theſe Mat-

Matters are grounded upon Acts of Parliament, and the Acts give them none. 2 *Vern.* 118.

Appearance.

BY the 9th general Rule *pars*, the Defendant hath four ſitting Days of courſe, after the Return of the *Subpœna*, to enter his Appearance, or the Plaintiff may, upon a ſufficient Affidavit of the Service of the *Subpœna*, enter an Attachment againſt the Defendant of courſe.

RULE 9, *pars.* Time for Appearance.

Formerly, if an Appearance was entered, or an Anſwer filed after the four Days were expired, but before the Attachment was entered, it prevented the Attachment, but it was ſettled by Mr. Baron *Wainwright*, that if an Appearance be entered, or an Anſwer filed, on the fifth Day, and that an Attachment is entered afterwards upon the ſame Day, yet the Attachment ſhall ſtand; otherwiſe the Defendant would have more than four Days to appear. But in the Caſe of *Camſter* againſt *Drew*, in this Court, in *Eaſter* Term 1755, the firſt Practice was reſtored, the Court thinking it very abſurd, that an Attachment ſhould

Attachment after the Time for appearing or anſwering is out, not good, if an Appearance be entered, or the Anſwer filed before the Attachment is entered.

ſhould be entered for want of an Appearance, or an Anſwer, when it was manifeſt by the Office Book, that an Appearance was actually entered, or an Anſwer filed. *Sed vide Bunb. Rep.* 251. 290.

Appearances are of two Sorts, that is to ſay,

I. Either to the Suit, or,
II. To the Proceſs.

And Appearances to the Suit, are five ways.

I. By Attorney.
II. In Perſon.
III. By Guardian.
IV. Committee, or,
V. *Prochein Amy.*

Who may not appear by Attorney.

All Perſons are obliged to appear by Attorney, except Officers of the Court, Infants, *Feme Coverts*, Idiots and Lunaticks.

Attorney may be appointed by Writing, or verbally.
Attorney appearing for a Defendant without an Authority, liable to Action.

A Perſon may appoint an Attorney to appear for him, either by Letter of Attorney, or by Word of Mouth. And if an Attorney appears for a Defendant without ſome Authority for ſo doing, he is liable to an Action; ſo that it is moſt adviſable for an Attorney, before he appears for a Defendant, to have ſome Direction in Writing for that Purpoſe.

Officers

Officers and Miniſters of the Court muſt appear in *propria Perſona*, becauſe they are ſuppoſed to be always preſent in Court.

Officers of the Court, to appear in *propria Perſona*.

If an Idiot ſues, or defends, he ſhall not appear by Attorney, Guardian, or *Prochein Amy*, but ever in *propria Perſona*. *Co. Lit.* 135. *i. e.* it muſt be in their Name, but followed by others. But an Infant, or a Minor, ſhall ſue by *Prochein Amy*, and defend by Guardian. *Ibidem.*

And Idiots alſo.

Infant how to ſue and defend.

An Idiot, a *Nativitate*, cannot appear by Attorney, but if the Idiot continued *de ſana Memoria*, for a long Time a *Nativitate*, and afterwards *ex ſola Viſitatione Dei* became *non compos*, it is not Error to appear by Attorney. 2 *Saunders*, 335, 336.

Idiots in what Caſe they may appear by Attorney.

One, not *compos mentis*, muſt appear by Guardian, if within Age, or by Attorney if of full Age. 4 *Co.* 124 *B. Palm.* 520.

Perſons *non compos* to appear by Guardian.

But Lunaticks generally ſue or anſwer, by their Committees.

Lunaticks by their Committees.

Infant Defendants cannot appear by *Prochein Amy*, for a Guardian and *Prochein Amy* are diſtinct, and the Suit, by *Prochein Amy*, was not before. *Weſt.* 1. *Ch.*

Infant cannot defend by *Prochein Amy*.

Ch. 48. and *Weſt.* 2. *Ch.* 15. And is, where, an Infant is to ſue his Guardian, or that the Guardian will not ſue for him; or where an Infant is Deviſee, and is to ſue the Executor, to ſecure the Legacy. *Cro. Jac.* 640. They can only appear by Guardians: For the Method of appointing a Guardian, to appear and anſwer for an Infant, ſee *Title Anſwer*, &c. *Antea.*

He is to appear only by Guardian.

And is to ſue by his Guardian, unleſs in ſome ſpecial Caſes.

But in all Caſes, where an Infant is Plaintiff, unleſs in theſe ſpecial Caſes, he muſt ſue by Guardian, and not by *Prochein Amy. Palm.* 296.

Infant refuſing to appear, the Court will appoint a Guardian.

If an Infant, of tender Years, neglects to appear, or to have a Guardian aſſigned, it is a Motion of courſe, (he being in Contempt to an Attachment) to pray for a Meſſenger to bring him into Court, and when he is there, the Court always aſſigns him a Guardian; but it is doubted whether this can be done, againſt an Infant who is a Peer of the Realm, whoſe Perſon is ſacred.

Infant Executor, with one of full Age, may ſue by Attorney.

An Infant, and a Man of full Age, are made Executors, the Infant may ſue by Attorney. 2 *Saunders.*

Ibidem.

Twiſden ſaid, that he of full Age, may make an Attorney for him under Age.

When

When an Appearance is entered it cannot be vacated, without Leave of the Court, and the Plaintiff is to have Notice of the Motion, for he has a Right to the Appearance when entered, and the Defendant ſhall not diſcharge himſelf therefrom, without the Plaintiff's having an Opportunity to oppoſe it.

An Appearance, when entered, cannot be vacated without Leave of the Court.

Arbitrament and Award.

AN Award is the Determination of Matters in Controverſy, by Submiſſion to Perſons, indifferently choſen by the Parties contending.

Award, what.

And this Submiſſion is to be in Writing, and to be ſigned and ſealed by the Parties in Controverſy; and is that Authority, by which the Arbitrators do proceed to determine, and end the Differences between the Parties; and this being a Contract or Agreement, muſt not be taken ſtrictly, but largely, and according to the Intent of the Parties ſubmitting. 1 *Bac.* 133.

The Submiſſion to the Reference.

When the Submiſſion is ſo ſigned and ſealed as aforeſaid, an Affidavit is to be made of the Perfection thereof, by a ſubſcribing Witneſs thereto, and upon pro-

How it is to be executed.

To be made a Rule of Court.

producing this Affidavit to the Court, a Motion may be made by an Attorney of the Court, to have the Submiſſion received and made a Rule of Court, which the Court will order.

And thereupon an Order conceived for the Referees to proceed.

And when the Rule is entered in the Book of Notes, the Officer of the Court, will then make out an Order, for the Referees to proceed upon the Reference; in which Order, the Submiſſion is recited at large. See the *Stat.* 10 *Will.* 3. ch. 14. *Poſt.* 174.

Power in the Submiſſion to examine Witneſſes, &c.

And for the better Proceeding of the Arbitrators upon the Submiſſion, a Power is generally inſerted to examine all ſuch Witneſſes, Writings, and Accounts, as ſhall be produced before them, by either of the Parties, as alſo to examine the Parties themſelves.

Of the Award, the Proceedings to confirm it.

When the Referees have finiſhed the Reference, and have agreed upon their Award, they then ſign and ſeal it, and deliver it to the Party in whoſe Favour it is made, and ſuch Party is to procure an Affidavit of the Perfection of the Award by the Referees, and of their publiſhing it as their Award, (which Affidavit is to be made, by a ſubſcribing Witneſs, to the Award, and is to be annexed or ſubſcribed to the Award) and thereupon, his Attorney may move the Court for the firſt Rule for confirming the Award, and the Court will thereupon

upon order that it ſhall be confirmed, unleſs Cauſe be ſhewn to the contrary in four Days, and the Award is then to be given to the chief Remembrancer, to be filed in the Office.

And this Order is to be ſerved on the oppoſite Party, and if he doth not, in four ſitting Days after Service, ſhew ſome Cauſe why that Award ſhould not be confirmed, the Court, upon Motion to be made by the Attorney, for the Party in whoſe Favour the Award is made, upon an Affidavit of the Service of the Order, and upon the chief Remembrancer's Certificate, of no Cauſe being ſhewn, why the Award ſhould not be confirmed, will make the Order for confirming it, abſolute; but notwithſtanding this Order, if the Award hath been procured by Corruption, or undue Means, by the aforeſaid Statute, the ſame ſhall be judged void, and of none Effect, ſo as Complaint of ſuch Corruption, or undue Practice be made before the laſt Day of the next Term, after ſuch Arbitration is made and publiſhed to the Parties. Ibidem.

The Time a Party hath to move to ſet aſide the Award.

Concerning

Concerning the Submiſſion.

Reference may be without a Suit depending, but generally ſome Proceeding is had.

BY the aforeſaid Statute, a Submiſſion to a Reference may be made a Rule of Court, although no Suit be commenced, or depending, between the Parties in Controverſy; however, the uſual Practice is to inſtitute a Suit, and procure an Appearance to be entered for the Defendant, before the Rule is moved to receive the Submiſſion.

Submiſſion by Word or Deed.

The Submiſſion may be by Word or Deed; if the Submiſſion be by Word, there is no Remedy to enforce the Party to perform the Award, but reciprocal Actions on the Caſe; and an Action will lie, if Money be awarded, for it is in Nature of a ſimple Contract. 1 *Ba. Abr.* 133.

Awards which are void at Law are ſo in Equity.

If two ſubmit themſelves to the Arbitrament of *I. S.* of all Controverſies, *ita quod*, &c. *de præmiſſis*, and *I. S.* makes an Award of Part only, ſo that the Award is void in Law, this ſhall not be made good in a Court of Equity; between *Robinſon* and *Biſs*, adjudged, 7 *Jac.* in *B. R.* and a Prohibition granted to the Council of *York*. 1 *Roll. Abr.* 377.

So

So if the Award differs from the Submiſſion, it ſhall be as well void in Equity, as at Law. 1 *Ch. Ca.* 186. *Nel. Ch. Rep.* 141. *S. P.* Ibidem.

If the Submiſſion to an Award, be conditional, *ita quod*, an Award be made *de et ſuper premiſſis*, &c. there if the Award be not of the whole, it is void: But if the Submiſſion to an Award, be not conditional as aforeſaid; then, though the Award be but of Part of the Matter referred, it is good for ſo much as it ſettles, though it leaves other Things at large. Per Lord *Maynard*, 2 *Vern.* 109. Ibidem.

The Diſtinction which has obtained with Reſpect to conditional Submiſſions, is, where the Submiſſion does in general ſet forth all the Matters in Controverſy, with a ſpecial Concluſion, *requiring*, or, *ſo that the Award be made of all the ſaid Matters*; in which Caſe, it has been held neceſſary, to make a final Determination of all the Particulars enumerated. *Cro. Eliz.* 838. But if there be no ſuch Enumeration, nor ſpecial Concluſion, then the Award may be good, though it make an End of Part of the Matters only. 1 *Roll. Abr.* 257. 8 *Co.* 976. And ſince the Courts of Law and Equity, have of late, been leſs nice in the Conſtruction of Awards, it is now agreed to The Diſtinction with Reſpect to conditional Submiſſions.

be a ſtated Rule in Awards that are conditional, or ſaid to be *de et ſuper premiſſis*. That if the Words uſed in them be, in their own Nature, more comprehenſive, and ſo extenſive to Things not within the Submiſſion; yet it ſhall be intended, that there was no other Matter between the Parties for them to lay hold on, but what was ſubmitted, if the contrary be not ſhewn; ſo *e converſo*, if the Words are more narrow, and leſs comprehenſive, than to take in all the Matter of Submiſſion; yet it ſhall be intended, that no more was in Controverſy, than what the Words naturally comprehend, if the contrary be not likewiſe ſhewn. 6 *Mod.* 232.

If the Reference breaks off, an Order is to be obtained for Liberty to proceed.

If the Reference, or Compromiſe, be broken off by Conſent, or otherwiſe, an Order muſt be obtained for Liberty to proceed; which the Court will grant on Motion of the Attorney for either Party.

The Parties to the Submiſſion.

One Perſon may conſent for another by Authority.

IF all the Parties to the Suit, conſent to refer the Matter to *I. M.* and *I. S.* one of the Parties ſignifies his Conſent, by ſigning a Paper to that Purpoſe, ſo that the Award be made at a certain Day

Day therein limited, and no Award is then made; but afterwards, the Court, in the Preſence of all the Parties (except *I. S.* who was abſent) but his Solicitor conſenting on his Behalf, refer it back to *I. M.* but not finally to determine, who made an Award; and it was reſolved that the Solicitor's Conſent ſhould not bind his Client, though it was objected, and admitted that an Attorney's Aſſent to a Reference, on Behalf of his Client, ſhould bind him at Law; between *Colwell* and *Child*, 1 *Ch. Ca.* 86. 1 *Ch. Rep.* 195. *S. C.*

Whether a Solicitor's Conſent ſhall bind his Client, though an Attorney's ſhall at Law.

If one Partner on the Behalf of himſelf, and the other Partner ſubmits, *&c.* though the Partner that did not ſubmit, is not bound, yet he who ſubmitted ſhall perform the Award. 2 *Mod.* 227.

Two Partners, and one ſubmits for both, he who ſubmits is only bound.

If *A.* and *B.* Executors of *I. S.* on the one Part, and *C.* his Widow, on the other Part, ſubmit to Arbitration; the Arbitrators may make an Award, not only of Matters in Difference between *A.* and *B.* jointly, or *A.* and *B.* ſeparately, and *C.* but alſo of Matters between *A.* and *B.* provided they have Knowledge of the whole Fact, and all the Parties intereſted are before them; between *Carter* and *Carter*, 1 *Vern.* 259.

Two ſubmit jointly, and another for himſelf, yet the Arbitrators may determine between thoſe who jointly ſubmitted.

The Matters determinable by Award.

Who may refer.

BY 10th *William* III. ch. 14. all Merchants, Traders and others, deſiring to End by Arbitration any Controverſy or Suit, for which there is no remedy but by perſonal Action, or Suit in Equity, may agree that their Submiſſion of the Matter to the Award or Umpirage of any Perſon or Perſons, ſhould be made a Rule of any of his Majeſty's Courts of *Record* which the Parties ſhall chooſe; and to inſert ſuch their Agreement in their Submiſſion, or the Condition of the Bond or Promiſe, whereby they oblige themſelves, to ſubmit to ſuch Award or Umpirage: Which Agreement being ſo made and inſerted in their Submiſſion, or Promiſe, or Condition of their Bonds, ſhall, upon producing an Affidavit thereof, made by the Witneſſes thereunto, or any one of them in the Court, in which the ſame is agreed to be made a Rule; and reading, and filing the ſaid Affidavit in Court, be entered of Record in ſuch Court; and a Rule ſhall be thereupon made by the ſaid Court, that the Parties ſhall ſubmit to and finally be concluded by the Arbitration, or Umpirage which ſhall be made of the Arbitrators, or Umpire purſuant to ſuch Submiſſion. And in Caſe of diſobedience to ſuch Arbitration

Agreements of Reference to be inſerted in the Submiſſion, or the Condition of the Bond, or Promiſe.

And the Submiſſion upon Affidavit of the perfection thereof, to be made a Rule of Court.

bitration or Umpirage, the Party neglecting or refuſing to perform the ſame, or any part thereof, ſhall be ſubject to all the Penalties by the Courſe and Practice of ſuch Court, uſually inflicted on ſuch as contemn a Rule of the ſaid Court, made in a Cauſe depending therein; and the Court, on Motion, will iſſue Proceſs accordingly; which Proceſs ſhall not be ſtopped or delayed in it's Execution, by any Order or Rule of any other Court, either of Law, or Equity, unleſs it ſhall be made appear on Oath, to ſuch Court, that the Arbitrators or Umpire miſbehaved themſelves, and that ſuch Award, or Umpirage was procured by Corruption, or other undue Means.

In caſe of Diſobedience, the Party liable to the ſame Penalty, as in Caſes of Contempt, and Proceſs to iſſue accordingly.

And ſuch Proceſs not to be ſtopped by any other Court, but upon Miſbehaviour or Corruption.

As there are many Caſes which are not in Law, nor by the aforeſaid Statute determinable by an Award, therefore it ſeems ſafeſt, when the Controverſy relates to thoſe, that the Party be bound in mutual Obligations to perform the Award; and then if either Party refuſes to perform what the Arbitrators award, he forfeits his Obligation.

Bonds of Arbitration.

And it is ſaid, that although the ſubmiſſion be by Bond, yet the Party may have it made a Rule of Court; in which Caſe, it is ſaid he may proceed on the Bond, and likewiſe have an Attachment for not performing the Award. 1 *Bac.* 134. 1 *Salk.* 73. But let an Appearance be

Submiſſion by Bond, may be made a Rule of Court, and remedy on each.

firſt entered, or ſome Proceeding firſt had, as aforeſaid.

What Caſes not determinable by Award.

Where the right of Freehold is in debate, the Property cannot be tranſacted by an Award; for the Arbitrators are in the room of the Parties themſelves, and Act in their ſtead as far as Commiſſioned; whatever, therefore, the Parties can do, may be done by the Arbitrators, but the Parties cannot paſs corporeal Inheritances without ſolemn livery. *Bac. Abr.* 132. Vol. I.

Right of Freehold not.

Annuity.

An Annuity is not determinable in Award, for it is reckoned in nature of a Freehold, and therefore cannot paſs without Deed of the Party. *Ibidem.*

Leaſes for Years.

It has been doubted whether Leaſes for Years, being Chattels real, could be transferred by Award; but an Award of the Arrears of Rent reſerved on a Leaſe for Years is good. *Ibidem.* 1 *Roll. Abr.* 264.

Certain and fixed Debts.

A certain and fixed Debt is not diſcharged by an Award; for the end and deſign of an Arbitration, is to reduce uncertain Debts and Duties to a Certainty; and to award a Man a certain Debt, is to give him no more, nor do any greater Thing for him than was done before; for now he can have but an Action, and that he might have had before,

fore; and to give him leſs than he had before, is to do him a manifeſt Injuſtice, which the Arbitrator cannot do. 1 *Bac. Abr.* 133. 1 *Roll. Abr.* 264.

The Arbitrators or Umpire, and herein of the Commencement, Determination, and Revocation of their Authority.

Umpire, and the Proceedings upon the Umpirage, the ſame as upon the Award.

IN the ſubmiſſion to a Reference, it is generally agreed upon between the Parties, that, in Caſe the Arbitrators do not agree ſo as to make an Award in the Premiſſes, by the Time for that purpoſe mentioned in the Submiſſion; that then, the Matters in difference between the Parties be referred to ſuch Umpire, as the Referees ſhall, by Writing under their Hands and Seals, nominate and appoint to end and determine the ſame; and ſuch Umpire may, upon ſuch Nomination, and Appointment, and upon the Order of Reference, proceed in like Manner, and with the ſame Power, as did the Referees; and the ſame Method is to be purſued for confirming the Umpirage or Award of the Umpire, as upon the Award of Arbitrators.

He cannot make his Umpirage the ſame Day, the Arbitrators have a Power to make their Award.

If the Submiſſion to an Award, be ſo as the Arbitrators make their Award at or upon the 27th of *March* then next; and if the Arbitrators make no Award,

then if the Umpire make his Umpirage on the ſame Day, the Umpire cannot make his Umpirage on the ſame Day, though the Arbitrators diſagree; for they have all that Day to make their Award. 2 *Vern.* 100.

Where their Power is determined by chooſing an Ummpire.

If there be a Submiſſion to two, ſo as they make their Award before Midſummer, and if they cannot agree, then to ſuch Umpire, as they chooſe, ſo as he make his Umpirage before Midſummer, and an Umpire is choſen accordingly, this is good; and ſo will his Umpirage be, if made; becauſe the Arbitrators had determined their Power before, by chooſing an Umpire; but if the Umpire be named in the Submiſſion, he cannot make his Umpirage before the Time given to the Arbitrators to make their Award in, be expired. *Per Holt. C. J.* 1 *Salk.* 70, 71, 72. But for this, *vide Cro. Car.* 263. *Raym.* 206. 1 *Lutw.* 544. 2 *Mod.* 169. 2 *Vent.* 116.

If they chooſe an Umpire by throwing Croſs and Pile, the Court will ſet aſide the Award.

If by the Submiſſion, the Arbitrators have Power to chooſe an Umpire, and they not Agreeing, throw Croſs and Pile, which of them ſhould name the Perſon, and the Umpire thus choſen, makes his Umpirage, the Court will ſet it aſide. 2 *Vern.* 485.

A Submiſſion to an Award, tho' made a Rule of Court, may be revoked, but the Court will grant an Attachment.

If the Parties in Court ſign an Order by Conſent to refer their Matters to Arbitrators, finally to determine, and their Award

Award to be final, and ſtand ratified by Decree without an Appeal, yet one of the Parties may revoke this Submiſſion; but in ſuch Caſe, the Court will grant an Attachment againſt him; between *Hyde* and *Petit*, 1 *Ch. Ca.* 185.

If the Submiſſion be without Deed, it may be revoked without Deed, and the Party ſhall loſe nothing; for *ex nuda ſubmiſſione non oritur actio*; but it is ſaid, the Party muſt give Notice of the Revocation. 1 *Sid.* 281.

Submiſſion without Deed revocable without Deed.

Alſo, if the Submiſſion be by Deed, it is of it's own Nature countermandable, though made irrevocable by the expreſs Words of the Deed; for the Arbitrators being conſtituted and put in the Place of the Parties, by their Conſent to act for them, they can no longer act than they have ſuch Conſent; but it cannot be countermanded without Deed, and Notice muſt be given of the Revocation. 1 *Brownl.* 62. 8 *Co.* 82.

Submiſſion by Deed, revocable by Deed.

A Man enters into an Obligation to ſtand to an Award, if the Party revokes it according to his Power, he hath forfeited his Obligation; for the making the Award becomes impoſſible by his Default, and therefore, the Obligation is become ſingle, and without the Benefit or Help of any Condition, but if it be without Obligation, he forfeits nothing. 8 *Co.* 82, 83. 1 *Brownl.* 62.

If Obligation be to ſtand to an Award, and a Party revokes, his Obligation is forfeited.

If

Several Plaintiffs or Defendants, one alone cannot revoke.

If ſeveral Plaintiffs or Defendants ſubmit to an Award, one cannot revoke the Submiſſion without the other, for joint Acts are conſidered as the Act of one Perſon, and there can be no Revocation, without the Act of that Perſon that made the Submiſſion. 1 *Brownl.* 62.

Feme Sole after Submiſſion marries, it is a Revocation.

If a *Feme Sole* ſubmits to Arbitration, and afterwards marries, this is a Revocation of the Submiſſion, and if it be by Bond, the Bond is forfeited. 2 *Keb.* 865.

Attachment for revoking the Submiſſion or hindering the Arbitrators to proceed.

If one of the Parties revokes the Submiſſion after it is made a Rule of Court, or hinders the Arbitrators from proceeding in the Award, the Court will grant Attachment. 1 *Salk.* 73. But if the Party dies, there is no Remedy by Attachment againſt his Repreſentatives, for the Contempt dies with him. 2 *Vern.* 444.

Concerning Submiſſions, and Awards, made purſuant to a Rule of Court, and of carrying the Award into Execution.

How Awards, made purſuant to a Rule of Court, are to be enforced.

BY the aforeſaid Statute, 10 *Will.* 3. the Parties may agree that their Submiſſion to the Award, or Umpirage of any Perſon, or Perſons, ſhall be made a Rule of

of any of his Majeſty's Courts of Record, and may inſert ſuch their Agreement in the Condition of their Bond; and a Rule of Court ſhall thereupon be made, that the Parties ſhall be concluded by ſuch Arbitrament, or Umpirage. And in caſe of Diſobedience, the Party neglecting, or refuſing, ſhall be ſubject to all the Penalties of contemning a Rule of Court, unleſs it appears on Oath, that ſuch Award was corruptly and unduly procured; in which Caſe, it ſhall be ſet aſide by any Court of Law, or Equity, *&c.*

If an Award is made a Rule of Court, according to a Submiſſion for that Purpoſe, and an Attachment is taken out, for not obeying the Award, and then the Party dies, againſt whom the Attachment iſſues; the Act of Parliament directing it to be carried on by Attachment, as is done in other Courts, for diſobeying a Rule of Court, by the Death of the Party, the Attachment is gone, and the Remedy loſt. *Mich.* 1703. between *Webſter* and *Biſhop.* 2 *Vern.* 444. Ibidem.

By the Death of the Party, the Attachment is gone, and the Remedy loſt.

If the Submiſſion be by Bond, and be alſo made a Rule of Court, it is ſaid, in this Caſe, the Party, in whoſe Favour the Award is made, may proceed on the Bond, and likewiſe have an Attachment for not performing the Award. 1 *Salk.* 73.

Submiſſion by Bond, and by Rule of Court; Remedy may be on each.

If

Award made pursuant to a Rule of Court, how confirmed.

If an Award is made pursuant to an Order of Court, the Party ought first to move the Court to confirm the Award, as is done upon a Master's Report; and either Side is at Liberty to except to it. 1 *Vern.* 469.

Exceptions will be allowed to the Award, though the Rule be otherwise.

If there be a Submission to a Reference by Order of Court, and the Award to be made, to be confirmed by the Decree of the Court, without Appeal, or Exception, yet Exceptions to the Award will be admitted: Ruled upon Debate. 2 *Vern.* 109.

Of making the Award, and for what Causes set aside, or determined.

Award to be made according to the Submission, or void.

HERE we must observe, that the Courts of Justice, have of late, been more liberal in the Construction of Awards than formerly, and that many of the nicest Distinctions to be met with in the Books, are by no Means to be admitted as Precedents in expounding Awards at this Day; and this the Courts do, in Furtherance of Justice, and for quieting of Controversies: However, as an Award is a Judgment, and can only be expounded by itself, without the Aid of an Averment of Matters *de hors*, to explain

explain the Meaning of the Arbitrators, it is neceſſary that on the Face of it, it appears, that it be made according to the Submiſſion; for if an Award be made of any other Thing, than what is contained in the Submiſſion, it is void; for no Act is my own, or binding to me, unleſs done by me, or by Commiſſion from me. 10 *Coke Rep.* 57. *Dyer* 242.

It ought to be certain and deciſive.

Alſo, as an Award is in Nature of a Judgment, it ought to be wholly deciſive; for if it doth not determine the Matter, it becomes the Cauſe of a new Controverſy; therefore, if the Arbitrators award a Bond, for quiet Enjoyment of Lands, without appointing a certain Sum, this is a void Award, and the Party is not obliged to give Bond to the Value of the Land; for then, the Senſe of the Award, muſt be ſupplied by Averment; now, if it hath the Credit of a Judgment, there can be no Interpretation made of the Award, but by the Words of the Award itſelf; for if it receives its Meaning from any Matters out of the Award, the Mind of the Arbitrators is only gueſſed at, and not expreſſed; but the Parties intended to be obliged only by what the Arbitrators themſelves declare to be their Award; and were the Bonds to be according to their Value, they cannot aſſign their Power to any Perſon to aſſeſs the Value. 5 *Co.* 77. 1 *Roll. Abr.* 263.

Awards

It ought to be equally and mutually ſatisfactory.

Awards muſt not be on one Side only; this muſt be underſtood thus, that all Controverſies being between two Parties, that which is awarded to be done to one, muſt be an Advantage to both, ſo as to end the Controverſy, and diſcharge one as well as give Satisfaction to the other, for if it doth not, it is manifeſtly unjuſt; and therefore, when ever it appears to the Court, that, notwithſtanding the Award, the Thing remains a Duty as before, and is not diſcharged, that apparently is an Award on one Side, and conſequently is void; not, that where one Party is by the Award, to have ſomething paid him, or the like, and not the other, that Award ſhould be nought; for perhaps nothing may be due to him, and he might be the only Treſpaſſer in the Caſe. 1 *Roll. Abr.* 253. 8 *Co.* 98.

Awards not to be impoſſible, contradictory, or repugnant.

If the Arbitrators award a Thing impoſſible, *ex natura rei*, it is void; but if they award a Thing which cannot be done, but is not in the Nature of the Act itſelf, contradictory, or repugnant, this may be a good Award; for there is no Conſtruction to be made of the Award, but by the Words thereof. 1 *Roll. Abr.* 248. 1 *Ch. Ca.* 87.

If they award a Sum of Money to be paid at a Day paſt, it is void. 8 *Ed.* 1. *B.* In what Caſes they ſhall be deemed ſo.

An Award that one ſhall pay 20*l.* where one hath not 20*d.* is good; for no Contradiction appears in the Award itſelf. 19 *Ed.* 4. 1. Ibidem.

Awards that one ſhall turn the River of *Thames*, kill, ſteal, forge a Deed, *&c.* are void. *Co. Lit.* 206. Ibidem.

An Award may be good for Part only, but then it muſt be final as to that Part. 1 *Bac. Abr.* 147. Ibidem.

But a conditional Award is not good, becauſe not final to determine Matters in Difference; the ſame Law, where any Thing is referred to the Arbitrators future Judgment, or Expoſition. *Cro. Ja.* 508. 1 *Bac. Abr.* 147. Ibidem.

An Award, as has been ſaid, is to receive a liberal Conſtruction, and to be governed by the Intent of the Arbitrators, where no Inconvenience will enſue; therefore, if the Arbitrators award a Thing to be done, without ſaying within what Time; the Party ſhall have reaſonable Time, becauſe they muſt intend all Things neceſſary, to the doing the Thing they award. 1 *Salk* 69. Awards to receive a liberal Conſtruction.

By

Award corruptly or unduly obtained to be ſet aſide.

By the aforeſaid Statute, 10 *Will.* 3. if an Award be corruptly and unduly procured, and it is made appear ſo, upon Oath, ſuch Award ſhall be ſet aſide.

If Arbitrators are guilty of Corruption, or exceed their Authority, &c. Equity will ſet aſide the Award.

Upon a Submiſſion by Conſent, and Order of Court, an Award was made, that a Bond ſhould be given by the Guardian, that the Infant at his full Age ſhould convey the Lands in Queſtion; and *Nottingham*, *L. C.* held, that when the Parties themſelves chooſe their own Judges, this Court will not relieve againſt the Award, unleſs it be in caſe of Corruption, exceeding Authority, and the like. But when there is a Reference by Order of this Court, and the Award appears unequitable, the Court will not decree it; and in this Caſe, it being unreaſonable, that the Guardian ſhould give ſuch a Bond, for the Infant may die, or if he live to Age, may refuſe to convey; and therefore, would not decree it: And he ſaid further, that he would never decree an Award to bind an Infant. 1 *Ch. Ca.* 279.

Will not decree an Award to bind an Infant.

Will ſet aſide an Award if unreaſonable.

The Plaintiff called the Defendant, who was a Butcher, Bankrupt Knave, which being ſubmitted to Reference, the Arbitrators gave him 495 *l.* to repair his Honour (as they called in the Award) and the Court thought the Damage too exceſſive

exceſſive, and ſet aſide the Award, but directed a Trial at Law, and the Jury gave him 10*l.* *Butcher* of *Croydon*'s Caſe, 3 *Ch Rep.* 76. 2 *Vern.* 251. *S. C.* cited; where it is ſaid, that the Court did not ſet aſide the Award, barely for exceſſive Damages, but becauſe it appeared that one of the Referees was the Butcher's Couſin.

Or for Kindred in the Referees. *Sed Quær.*

If Tenant for Life commits Waſte to the Value of 380*l.* and his Eſtate is but 70*l.* *per Ann.* and an Action of Waſte is brought againſt him, by him in Remainder, and it is ſubmitted to a Reference, by Rule of Court, but before an Award made, the Tenant for Life repairs the Places waſted to 40*l.* and forbids the Arbitrators, and likewiſe the Umpire, to proceed in making any Award; but notwithſtanding the Umpire awards the Party 380*l.* yet the Court will not ſet aſide the Award, there appearing no Fraud or Colluſion in the Matter. *Paſch.* 1683, between *Brown* and *Brown.* 1 *Vern.* 157; although it was objected, that 380*l.* was near the Value of an Eſtate for Life, of 70*l.* *per Ann.*

But will be very cautious, if there appears no Partiality, Fraud, or Corruption.

Arbitrators promiſed to hear Witneſſes, but made their Award before they did ſo, and the Award was ſet aſide. 2 *Vern.* 251.

Referees promiſe to hear Witneſſes, and do not, Award ſet aſide.

If the Arbitrators appear to be intereſted, the Award ſhall be ſet aſide.

If the Arbitrators appear to have an Intereſt in the Cargo, touching which the Award is made, and therefore put too great a Value thereon, and in five Days after the Award made, the Money awarded is attached by the Arbitrators for Debts owing to them, the Court will ſet aſide the Award. *Hill.* 1691, between *Earl* and *Stocker*. 2 *Vern* 251.

Or if the Arbitrators appear to have been miſtaken.

If it appears that the Arbitrators went upon a plain Miſtake, either as to the Law, or in a Matter of Fact, the ſame is an Error appearing in the Body of the Award, and ſufficient to ſet it aſide. 2 *Vern.* 705. But the Plaintiff failing to make out his Caſe by Proof, his Bill was diſmiſſed.

Equity will in ſome Caſes decree Performance of an Award, not ſtrictly binding in Law.

The Plaintiff and Defendant had ſubmitted to an Arbitrament by Bond, and an Award was made not binding by Form of Law, by which the Plaintiff was to pay the Defendant nine hundred Pounds, and to ſeal a Releaſe to the Defendant, and the Defendant was to aſſign ſeveral Securities he had from the Plaintiff; the Plaintiff ſold ſome Lands to raiſe the nine hundred Pounds, expecting the Defendant would receive it, and he gave him Intimation he would, and tendered him the nine hundred Pounds, and a Releaſe executed by the Plaintiff; and though there was no other Execution on the Plaintiff's part of the Award,

Award, and though the Award was *extrajudicial*, and not good in ſtrictneſs of Law, yet the Lord Chancellor Decreed it ſhould be performed in Specie. *Paſch.* 1687, between *Norton* and *Maſchall.* 2 *Vern.* 24.

But a Bill was exhibited to have an execution of an Award, which was performed by neither Party, and the Defendant demurred, becauſe there was no Precedent that a Court of Equity had ever carried ſuch Awards into Execution, and the Demurrer was allowed. *Mich.* 1704, at the *Rolls*, between *Biſhop* and *Webſter*. *Bac. Equ. Ca.* 51.

But it muſt be executed by one of the Parties.

If one of the Parties to an Award made on a Submiſſion in Court, purſuant to the late Act of Parliament, dies before the Money is paid, no *Scire facias* can iſſue againſt his Heir or Executor, to inforce Payment, for the Award, though eſtabliſhed by the Court, is not in nature of a Judgment or Decree, to be proſecuted, but in nature of a Contempt, which dies with the Perſon, and ſo held all the Judges. *Preced. in Ch.* 223.

Awards are in nature of Contempts, and before carried into Execution, die with the Party.

If the Submiſſion to an Award be conditional, *ita quod*, an Award be made *de & ſuper premiſſis, &c.* there if the Award be not of the whole, it is void, but if the Submiſſion be not conditional, as aforeſaid, then though the Award be

Submiſſion to an Award, but of Part, where it is conditional, that it be of the whole.

but of Part of the Matters referred, it is good for ſo much as it ſettles, though it leaves other Things at large. 2 *Vern.* 109.

Exceptions may be taken to an Award.

Exceptions may be taken to an Award upon Submiſſion, by Order of Court. 1 *Ch. Ca.* 186. 1 *Vern.* 470.

Three Arbitrators, and one is excluded by Fraud, or Force, or two of the three have private Meetings, or refuſe to admit one of the Parties, it will vitiate the Award.

If a Submiſſion is to three Arbitrators, or any two of them, and two of them by Fraud or Force will exclude the other, that alone is ſufficient to vitiate the Award; or if they have private Meetings, and admit one of the Parties, but give no Notice to the other, and ſuffer the Parties Attorney, whom they admitted, to draw up the Award, ſuch Award ſhall be ſet aſide for Partiality and Unfairneſs. *Mich.* 1705, between *Burton* and *Knight*. 2 *Vern.* 514.

Attorney and Solicitor.

Attorney from the Proxy at the civil Law.

AN Attorney in our Law anſwers to the Proxy in the ancient Civil Law, which alſo hath the Names of *Procurator* and *Proctor*. Of the Definition of this Officer, the Original of the Inſtitution, wherefore, for what Purpoſes, and the Duties belonging to this Office as at the civil Law, I had treated pretty largely; but as this, with other Things, which for the

the Reaſons mentioned in my Preface, I was obliged to abridge, or rather in the ſame Manner, make Reference to, would have ſwelled this Work to a much larger Size than I have ſent it out in, I ſhall therefore beg leave to refer my Readers to *Domat's Civil Law*, Vol. I. *Fit.* 15, Pa. 226, to 235, and Vol. II. *Fit.* 5, Pa. 605 to 613.———What is therein ſet down, they may rely on it, is extremely well worth their moſt careful Peruſal, as it takes in every Circumſtance that tends to make the Profeſſion of an Attorney of publick Utility, and worthy of Eſteem.

How conſidered in a Court of Equity.

I ſhall alſo refer them to my *Practice of the Law Side of the Exchequer*, for ſome Matters relating to this Profeſſion, as it is at this Day: And here it is to be obſerved, that when this Officer or Miniſter of the Court, is converſant about Matters of Equity, he is more properly ſtiled a *Solicitor*; but in the general, he is conſidered, in Equity, in the double Capacity, and therefore has a double Term Fee, to wit, two Shillings and ſix Pence, as Attorney, and five Shillings Fee, as Solicitor.

His Term Fee.

RULE 82. Attorney not to move in a Cauſe unleſs retained.

By the 82d general Rule, no Attorney is to move, in any Cauſe, unleſs he be retained therein, eſpecially where another appears in the Cauſe; and if any Attorney will move contrary to this Rule, he is to be reprimanded by the Court, and

to pay twelve Pence to the Box for ſuch his Miſbehaviour.

RULE 83. Attorney not to move for any Rule or Order, to be done of courſe.

And by the 83d Rule, if any Attorney ſhall (in Term Time) move for any Rule or Order herein before ſettled to be done of courſe, he ſhall pay twelve Pence to the Box for every Time he ſhall ſo move; and in the four Days after *Eaſter* Term, or in the eight Days after any other Term, he ſhall pay two Shillings to the Box.

RULE 84. The Penalty on an Attorney for averring a Matter of Fact, which appears to be falſe.

And by the 84th Rule, if any Attorney ſhall aver to the Court, as of his own Knowledge, any Matter of Fact, which ſhall appear to the Court to be otherwiſe, he ſhall forfeit and pay to the Box, the Sum of ten Shillings, and not to be heard till the ſame be paid.

The Proceedings in Order to change an Attorney pending a Suit.

If either Party, Plaintiff or Defendant, would change his Attorney, he muſt firſt obtain an Order for that purpoſe, which the Court will grant, on an Attorney's motion, unleſs Cauſe be ſhewn to the contrary in a ſhort Day; and if no Cauſe be ſhewn to the contrary, in four Days after Service of the Order, then, upon Affidavit of the Service of the Order upon the Attorney, and upon a Certificate of no Cauſe ſhewn, and upon an Attorney's Motion, the Order will be made abſolute.

And

The former Attorney to be paid or ſecured his Bill.

And in all Caſes where a Party hath changed, or would change his Attorney pending a Suit, he muſt pay him his Bill of Coſt, or the Court, upon Motion of the Attorney, will ſtop all further Proceedings, until the Coſt be paid, or a ſufficient Sum lodged in Court, or ſecured to abide the Taxation of the Bill.

An Attorney, may keep Papers, &c. until paid his Bill.

An Attorney, or Solicitor, may retain his Client's Deeds, or Papers, until his Bill be paid. 2 *Peere Williams*, 460.

Petition againſt an Attorney for Mal-practice, &c. and the Proceeding thereon.

If it ſhall appear to the Court, that an Attorney hath been guilty of any Mal-practice, or Miſbehaviour, in his Duty as an Attorney, the Court, upon Complaint thereof, will puniſh him, either by Suſpenſion, or Attachment, or by ſtriking him out of the Roll; and if the Offence be of a very heinous Nature, they will ſtrip off his Gown.

Ibidem.

And the Complaint is to be by a Petition to the Court, with an Affidavit of the Truth of the Facts contained therein, and Counſel is to move thereon: But upon the firſt Application, the Court generally give the Attorney a Day to anſwer the Petition, before it be ſuffered to be read; and if upon the Coun-

ſel's ſtating of the Caſe, upon the Petition, it ſhall appear to be a frivolous or vexatious Complaint, and not for Malpractice, or Miſbehaviour, in his Duty as an Attorney, the Court will not hear it.

Plea of Privilege, when good.

Two of the Defendants being Officers of the *Exchequer*, plead the Privilege of the *Exchequer*, but the Plea was overruled, becauſe there was a third Defendant, who had no Right of Privilege; between *Fanſhaw* and *Fanſhaw*, *Trinity*, 1684. 1 *Vern.* 246. *Vide Title Privilege.*

Attorney may be appointed by Writing, or by Word of Mouth, but if he appears for a Defendant without an Authority, he is liable to an Action.

A Perſon may appoint an Attorney to appear for him, either by Letter of Attorney, or by Word of Mouth; but if an Attorney, appears for a Defendant, without ſome Authority for ſo doing, he is liable to an Action; ſo that it is moſt adviſable for an Attorney, before he appears for a Defendant, to have ſome Direction in Writing for that Purpoſe.

Officers of the Court to appear in *propria Perſona*.

Officers and Miniſters of the Court, muſt appear in *propria Perſona*; becauſe they are ſuppoſed to be preſent in Court.

A Bill lies by a Solicitor for Fees.

A Solicitor may have a Bill for Fees only, if for Buſineſs done in this Court, and ſo he may, when the Buſineſs is done in another Court, if it relates to another

another Demand the Plaintiff makes in this Court. 1 *Vern.* 203.

The Attornies do themſelves make out the *Subpœnas* in this Court, but no other Writ whatſoever.

Attornies make out the *Subpœnas*.

A Solicitor proſecuted a Suit in the Name of a Stranger, who not being to be found, the Maſter of the Rolls declared, that if there were one Precedent in the Caſe, he would make another, and order the Solicitor to pay Coſts. *Ch. Ca.* 71.

A Solicitor if compelled to pay Coſts, not producing his Client.

If an Attorney, or Solicitor, ſhall appear to be guilty of a groſs Neglect, the Court will order him to pay the Coſts. 1 *Will.* 593.

Attorney or Solicitor, in what Caſe to pay Coſts.

In the Caſe of *Vaughan* againſt *Guy*, *Moſeley's Rep.* 245, it was ſaid, that it has been reſolved, that the Statute of Limitations will extend to an Attorney's Bills, though they are Things done of Record.

The Statute of Limitations extends to an Attorney's Bills.

It is ſaid, that if an Order be made on a Perſon who is an Officer, Servant, or Miniſter of the Court, as an Attorney, &c. that there is no Neceſſity of ſerving him with it, as he is ſuppoſed to be preſent, and to know what paſſes in Court; but it is the better Way to ſerve the Order.

An Order upon an Officer or Attorney, &c. of the Court, to be ſerved on him.

An

An Attorney may aſſent to an interlocutory Order, but not to a Reference finally to determine.

An Attorney's Aſſent, to an interlocutory Order, may bind, but not to a Reference finally to determine. 1 *Cha. Ca.* 87.

Proceedings againſt Attornies, on filing Bills againſt them.

Where an Attorney is Defendant to a Bill, a *Subpœna* is not to be prayed in the Bill againſt him, but an Order for him, to anſwer the Plaintiff's Bill, in the uſual Time, unleſs he is ſued as Executor, Adminiſtrator, Guardian, or Truſtee.

Ibidem.

And the Attorney for the Plaintiff is to move the Court, that the Defendant being an Attorney, may anſwer the Plaintiff's Bill in the uſual Time, which the Court will order, and he is to be ſerved with an atteſted Copy of this Order; and if he doth not anſwer in the Time mentioned in the Order, upon Affidavit of the Service thereof, and a Certificate of no Anſwer being filed, the Court upon Motion of the Plaintiff's Attorney, will impoſe a Fine of forty Shillings on the Attorney, ſo neglecting, or refuſing to anſwer; and when a forty Pound Fine is eſtabliſhed, the Court, on ſuch Motion as aforeſaid, will award an Attachment to the Purſuivant againſt him.

An Attorney not to be attached for not anſwering a Bill, until

It was determined in the Caſe of Lord *Caſtlecomer* againſt *Mathews*, *Hillary* 1748,

1748, that the Practice of this Court is, that an Attachment ſhall in no Caſe iſſue againſt an Attorney, for not anſwering a Bill filed againſt him, until a forty Pound Fine is eſtabliſhed. And note, the firſt Fine impoſed upon an Attorney, by the Court, for not anſwering a Bill, after he hath been ſerved with an Order for that Purpoſe, is forty Shillings, the ſecond Fine five Pound, and after that, every Fine is doubled until they amount to forty Pound.

a forty Pound Fine is eſtabliſhed.

The firſt Fine is forty Shillings.

Where a Client and his Attorney, or Solicitor, ſettle and ſign the Bill of Coſt, or the Accounts relating thereto, the Client cannot afterwards compel him to tax the Bill, but is put to his Remedy by Bill in Equity; ſo determined in the Caſe of Lord *Angleſey* againſt *Coultberſt*, in *Chancery*, in 1742, and in this Court, on a Petition, in the Caſe of *Burton* againſt *Burke*, Attorney, 5th *July*, 1743.

After a Bill of Coſt ſettled between Attorney and Client, and ſigned, it ſhall not afterwards be taxed, the Client's Remedy is by Bill in Equity.

Attornies and Solicitors are intitled to ſix Shillings and eight Pence, for every Attendance of an Hour, upon the Buſineſs of their Clients; ſo determined in the Caſe of Executors *Richardſon* againſt Executors *Wetherelt*, in this Court, *Eaſter* Term, 1754.

Attornies and Solicitors intitled to ſix Shillings and eight Pence for every Attendance of an Hour.

And here let it be noted, that although the Officers of the Court, do uſually ſo far indulge Attornies, who are

Attornies though uſually paſſed in the Offices, in Suits where they are Parties, yet are to pay the

Fees, if they afterwards recover them in Coſt.

are either Plaintiffs or Defendants in Suits, as not to require the Office Fees, whilſt the Cauſe is in *tranſitu*, yet theſe Fees do by no Means belong to the Attornies; and if they recover them in Coſt from the oppoſite Party, they are bound to pay them to the Officers who have ſo indulged them; as alſo, to pay the Counſel all ſuch Fees as are taxed for them, and in which ſuch Attornies have been alſo indulged.

What they are intitled to for drawing and copying Bills of Coſt.

They are alſo intitled to three Shillings and four Pence a Side, pretty cloſe written, for drawing and copying Bills of Coſt between them and their Clients; and I ſee no Reaſon why this ſhould not be alſo taxed between Party Party; the Charge is moſt reaſonable, conſidering the Books they are to keep, the Entries they are to make, and the innumerable ſmall Articles, of which Bills of Coſt, in the general, conſiſt. For more of this Matter, ſee my *Practice of the Law-Side of the* Exchequer, and the Act of Parliament there inſerted.

Bills.

Bills.

A Bill is the firſt Proceeding in a Court of Equity, and in its general Term, ſignifies a Petition of the Complainant to the Chancellor, Judge, or Judges, where the Cauſe is to be heard, ſetting forth, by whom, in what, and how the Complainant is grieved or injured, that he is without Remedy, ſave in Equity, or at leaſt is properly relievable there; and by his Bill, or Petition, prays ſuch Relief, or Order, as may ſeem moſt ſuitable to the Nature and Merits of his Caſe; as alſo prays a *Subpœna*, and ſometimes other different Proceſs, according to the Nature of the Complaint, and that the Defendant may be obliged to anſwer all the Allegations in the Bill upon Oath. Bill what, and what to contain.

And of Bills, there are ſeveral Sorts, *to wit*, an Original or firſt Bill for Relief; —— Bills of Diſcovery on the Popery Acts; ——Bills of Diſcovery of Evidence, *&c.* (for which, ſee *Title Witneſſes*, &c.) —— an amended Bill; —— a ſupplemental Bill; —— a croſs Bill, for Relief, or Diſcovery; —— a Bill of Interpleader; —— a Poſſeſſory, or Injunction Bill; —— a Bill of Review and The ſeveral Sorts of Bills.

and Reverſal; —— a Bill original after a Decree; —— a Bill of Revivor; —— Bills *quia timet*, (under which are the Proceedings on Bills to perpetuate the Teſtimony of Witneſſes to Wills, Deeds or Truſts,)—— and Bills of Peace.

The Bill taken from the Libel in the Canon Law.

The original Bill in Equity, anſwers to the Libel in the Canon Law, as the *Subpæna* does to the Citation; and the praying general Relief, according to Equity and good Conſcience, is in the Nature of the ſalutary Clauſe in the Libel; and the narrative Part, is in the Nature of the Poſitions; and the interrogatory Part in the Nature of the Articles; and the Prayer of Relief, after the Manner of the antient Libel; and in the Bill the Fact muſt be ſet out as it is, with all equitable Circumſtances, and proper Interrogatories framed, and put to the Conſcience of the Defendant, upon the ſeveral Facts and Circumſtances.

Ibidem.

But note, according to the antient Civil Law, the *Litis Conteſtatio*, was before the *Prætor*, and the Poſitions and Articles before the Judge; but the modern Libel of the Canoniſts, was formed from the Libel, the Poſitions, and the Articles, for Diſpatch thrown into one, and now called *Libellus Articulatus*: So in Equity, the Libel, Poſitions, and Articles, are thrown into one Bill; and hence

hence it is that no Interrogatories, can be put, that do not ariſe from ſome Fact, alledged or charged in the Bill; and if the Interrogatories do not ariſe from the Facts alledged in the Bill, but are totally foreign to it, the Defendant may refer them for Impertinence, or he may demur to ſuch Interrogatories, as having no Foundation in the Bill; or he may omit to anſwer them; and if there be Exceptions for want of an Anſwer to ſuch Interrogatories, the Exceptions, on a Referrence, will be over-ruled with Coſts. *Gail.* 132. *Maranta*, 265. 308.

No Interrogatories to be put into the Bill, but what ariſe from ſome Fact charged in the Bill.

Bills muſt be true in Subſtance, Matter plain, yet ſufficiently alledged, with all neceſſary Circumſtances, as Time, Place, Manner, and other Incidents: They muſt be for Matters properly cognizable in the Court where they are filed; they muſt have convenient Form, and muſt neither be ſcandalous, prolix, or impertinent; and muſt be ſigned by Counſel and Attorney.

How it is to be drawn, and the Rules and Forms to be obſerved therein.

The Bill was originally filed, before the iſſuing of the *Subpœna*, and was a Petition for it.

But there being a Deviation from the Practice that proved burthenſome to the Subject, it was enacted by 6 *Annæ*, ch. 10. *pars*, That no *Subpœna*, or other Proceſs for Appearance, ſhall iſſue out of any Court of Equity, until after the Bill

And no *Subpœna* to iſſue, until the Bill is filed.

Exception.

Bill is filed with the proper Officer, except in Caſes of Bills for Injunctions, to quiet Poſſeſſions, to ſtay Waſtes, or Suits at Law commenced, and a Certificate thereof brought to the proper Officer, who uſually makes out *Subpœnas*, or other Proceſs in the ſeveral Courts of Equity, under the Hand of the Officer, who uſually files Bills in Equity, for which Certificate he ſhall have no Fee.

How to be prepared for filing.

The Bill is to be ingroſſed on Parchment, and is to be ſigned by Counſel and Attorney, and is to be filed in the Chief Remembrancer's Office, for which the Plaintiff is to pay the Fee of one Shilling and ſix-pence; and the Plaintiff may then iſſue his *Subpœna* againſt the Defendant to compel him to appear.

Bill for Injunction, to ſtop Proceedings on a Decree, the Facts to be verified by Affidavit.

Where a Bill is filed for an Injunction, to ſtop Proceedings on a Decree, an Affidavit is to be made by the Plaintiff, at the Foot of the Bill, that the ſeveral Facts charged in the Bill are true.

Injunction, in what Caſes.

If the Bill is to quiet the Poſſeſſion of Lands, or to ſtay Waſte, or to ſtay Proceedings at Law, an Injunction is to be prayed therein.

Perſon out of the Kingdom filing a Bill in this Court, to give Security to pay Coſt.

Where a Perſon, who is out of the Kingdom, files a Bill in this Court, and that it ſo appears upon the Face of the Bill,

Bill, or by Affidavit, the Court, upon Motion of the Defendant's Attorney thereon, will order the Plaintiff to give reaſonable Security to pay the Coſts, in caſe the Bill ſhould be diſmiſſed; and this Motion may be made before the Defendant hath anſwered. And ſo it has been ordered in ſome Caſes, where the Plaintiff hath been in Priſon, (and eſpecially if not at the Suit of the Defendant) and inſolvent, but, in this latter Caſe, it is according to the Circumſtances.

So in ſome Caſes where the Plaintiff has been in Priſon.

Bills to which Anſwers are to be put in, pray the following Writs, *viz.* The Writ of *Subpœna*, *Duces tecum*; the Writ of Injunction to ſtop Proceedings at Law; and the Writ of *ne exeat Regno.*

Bills, what Writs to pray.

The Bill againſt Force, Fraud, and Waſte, *&c.* and all poſſeſſory Bills, pray Injunctions to be reſtored or quieted; as alſo Injunctions, in Nature of Writs of *Eſtrepement*, to prohibit Waſte, *&c.*

Ibidem.

By the 8th General Rule, upon filing any Bill againſt His Majeſty's Attorney General, to be relieved againſt any Information, *Scire facias*, or other Matters, His Majeſty's Attorney General ſhall not be ſerved with a *Subpœna* to anſwer, but ſhall be attended with an atteſted Copy of the Bill, and an Order deſiring His Majeſty's Attorney General to anſwer

RULE, 8. Bill filed againſt his Majeſty's Attorney General and the Proceedings thereon.

ſwer in four Days after ſuch Service, which Order the Chief Remembrancer is to enter of Courſe; and if His Majeſty's Attorney General ſhall fail to anſwer within that Time, upon Affidavit made of ſuch Service, and Motion thereon, an Order ſhall be granted to ſtay Proceedings until Anſwer, or further Order of the Court, and his Anſwer is to be put in without Oath.

Whether a *Subpœna* ſerved, and a Bill filed, is a *Lis pendens* againſt all Perſons.

A *Subpœna* ſerved and a Bill filed, is a *Lis pendens* againſt all Perſons; but the Service of a *Subpœna*, without a Bill being actually filed, makes no *Lis pendens*: But the Bill being filed the *Lis pendens* comes from the Service of the *Subpœna*, though it be not returnable until the next Term, and though the Party lives ever ſo remote; for otherwiſe a Man, upon the ſervice of the *Subpœna*, might alien his Lands, and prevent the Juſtice of this Court; but that being by the Counſel obſerved to be a hard Fiction in Equity to bind Purchaſers, it was propoſed that ſome Courſe might be taken, by having ſome public Record or Kalendar kept, whereunto Purchaſers might have reſort, and ſee what Lands are in Demand in this Court, as they may at Law, in Caſe of Fines. *Cur. adviſare vult.* 1 *Vern.* 318. *Anonymus.*

Agreed, it is not, if there is only a *Subpœna* ſerved and no Bill filed.

But where a *Lis pendens* is to affect, there muſt be a continued Proſecution.

But where a Man is to be affected by a *Lis pendens*, there ought to be a cloſe and continued Proſecution.

In

In the Caſe of *Preſton* againſt *Tubbin*, 1 *Vern.* 286. it was ſaid, that if a Man has exhibited his Bill to have Articles performed, there he may, by an Original Bill, affect a third Perſon with Notice of the firſt Suit, that ſhall come in and purchaſe the Eſtate pending that Suit; for, otherwiſe, though a Man has proceeded never ſo cautiouſly, and immediately exhibited a Bill to have Articles performed, yet a Stranger may come in, in the mean Time, and prevent him of the Eſtate. Ibidem.

But that was denied by the Court, who ſaid that with actual Notice, you may affect any one by an Original Bill; but as to Notice purely by a *Lis pendens*, you ſhall not affect any one, who is no Party to the Suit by an Original Bill; unleſs the former Cauſe has proceeded to a Decree, and that there is not that Danger in the Caſe, as the Counſel for the other Side apprehends; for if the firſt Suit be proceeded in with Effect, all Perſons that come in *pendente Lite*, though they be no Parties to the Suit, their Intereſt ſhall be bound, and avoided by the Decree in that Cauſe. Ibidem.

In the Caſe of *Sorrel* againſt *Carpenter*, 2 *Williams*, 482, it was declared by Lord Chancellor *King*, that a Purchaſe *pendente Lite*, though without actual Notice, and for a valuable Conſideration, A Purchaſe *pendente Lite*, though without actual Notice, and for a valua-

bleConſideration, ſhall be ſet aſide; but if there be any Fraud, it will be highly diſcountenanced.

yet ſhall be ſet aſide; and that though in this Caſe the Rule of Equity be hard, yet is in imitation of the Common Law, where in a real Action, if the Defendant aliens, pending the Writ, the Judgment will over-reach the Alienation; but as it is hard enough, in ſome Caſes, to make People take Notice of a Decree, it is ſtill harder to oblige them to take Notice of the Pendency of a Suit, it being a difficult Matter to ſearch for Bills in Equity, or to be able to get Notice of them; and that therefore, in Caſe of a real Purchaſe, *pendente Lite*, the Plaintiff ſhall be held to ſtrict Proof; and if any Flaw at the Hearing, be on the Plaintiff's ſide, the Court will not let him amend; but if the Purchaſe, *pendente Lite*, be fraudulent, and to elude the Juſtice of the Court, it ought to be diſcountenanced.

But the Plaintiff ſhall be held to ſtrict Proof, and if any Flaw be at the Hearing, he ſhall not amend.

By whom a Bill may be brought in this Court.

Exchequer, it's firſt Inſtitution.

THE Court of *Exchequer*, though an antient Court of Equity, yet was originally but a private Court, and inſtituted only for conveying the King's Treaſure and Revenues into his Coffers, and no Perſon, by Act of Parliament, allowed to ſue therein, who was not a Miniſter, or Servant to a Miniſter of the

the Court: But in proceſs of Time, this was overlooked; and now, whoever will, may commence Suits in this Court either in Law or Equity: But in order to give Juriſdiction to the Court, the Plaintiff, in every Bill filed in this Court, ſhall ſurmiſe, that he is Debtor to the King, and that for the wrong the Defendant doth him, he is leſs able to ſatisfy the Debt which he owes to his Majeſty at the Receipt of this Court; or for want thereof, the Defendant may demur to the Bill, and the Demurrer ſhall be allowed.

It's Juriſdiction enlarged, and how the Plaintiff is to intitle himſelf to the Juriſdiction of the Court.

If the King ſues for Equity in this Court, the Bill is filed in the Name of his Attorney General.

Bill for the King to be in the Attorney General's Name.

The King may ſue in *Chancery* for Equity. 1 *Rolls Abr.* 373.

The King may ſue for Equity.

The Chancellor himſelf may ſue or be ſued in Equity, but he cannot make a Decree in his own Cauſe. *Ibidem.*

The Chancellor may ſue, or be ſued in Equity.

If an Alien purchaſes Lands, in the Name of another, admitting the King is intitled to the Truſt, yet he muſt ſue in Equity to have it executed. *Ibidem*, 194.

The King muſt ſue in Equity to have the Truſt of an Alien's Eſtate executed.

A Bill may be brought in behalf of an Infant in *ventre ſa mere*, and an In-

Bill may be brought in behalf of an Infant in *ventre ſa mere.*

junction obtained to ſtay Waſte. 2 *Vern.* 711.

Any one may bring a Bill in behalf of an Infant, but not of a *Feme Covert* without her Conſent.

Any one may bring a Bill as *Prochein amy* to an Infant without his Conſent, becauſe it is at his Peril that brings it to be anſwerable to the Event; but none can bring a Bill in the Name of a *Feme Covert*, as her *Prochein amy*, without her Conſent; and if ſuch Bill be brought, upon her Affidavit of the Matter, it will be diſmiſſed. Agreed by the Court, *Mich.* 1713. between *Andrews* and *Cradock*. See *Bacon's Equity, Ca.* 72.

Who are to be Parties to it.

Care to be taken that all neceſſary Parties be brought before the Court, or the Court will make no Decree.

THERE is not any Thing, in which Courts of Equity are at this Day more careful and exact, than in ſeeing that all proper and neceſſary Parties are brought before the Court by the Plaintiff's Bill before they determine the Suit; and this they do, in order to prevent multiplicity or circuity of Suits; therefore, Counſel are to be moſt eſpecially careful, that they make all Perſons whatſoever Parties to the Bill, who are in any Sort concerned, in Intereſt, or their Repreſentatives; for if, upon the Hearing it ſhall appear, that any ſuch Party is omitted, the Court will make no Decree.

And

The Defendant may demur at the Hearing for want of Parties.

And where a neceſſary Party is wanting, the Defendant may, for this Cauſe, demur at the Hearing; and the Demurrer ſhall be allowed, and the Court will either diſmiſs the Bill, or will order the Cauſe to ſtand over, with Liberty for the Plaintiff to amend his Bill, and the Plaintiff is to Pay, to the Defendant, the Coſt of the Day.

When the Plaintiff's Bill ſhall be diſmiſſed with Coſts, and when it ſhall be adjourned over for want of Parties.

If it appears to the Court that a very neceſſary Party is wanting, and that without him no regular Decree can be made; as where a Man ſeeks for an Account of Profits, or Sale of a real Eſtate, and it appears, upon the Pleadings, that the Defendant is only a Tenant for Life, and conſequently, the Tenant in Tail, cannot be bound by the Decree. And where one Legatee brings a Bill againſt an Executor, and there are many other Legatees, none of which will be bound either by the Decree, or by the Account to be taken of the Teſtator's Aſſets, and each of theſe Legatees, may draw the Account in Queſtion over again at their Leiſure; or where ſeveral Perſons are intitled as next of Kin, under the Statute of Diſtributions, and only one of them is brought on to a Hearing; or where a Man is intitled to the Surplus of an Eſtate under a Will after Payment of Debts, and is not brought on; or where the real Eſtate is to be ſold under a Will, and the Heir at Law is not brought on; in theſe, and all other Caſes,

where the Decree cannot be made uniform, the Plaintiff ſhall not Proceed; for, as on the one Hand, the Court will do the Plaintiff Right; ſo, on the other Hand, they will take Care that the Defendant is not doubly vexed; he ſhall not be left under precarious Circumſtances, becauſe of the Plaintiff, who might have made all proper Parties at firſt, and whoſe Fault it was that it was not ſo done: And therefore, in all theſe Caſes, it is conceived, that the antient Rule of diſmiſſing the Bill with Coſts, for want of abſolute and neceſſary Parties, is the ſureſt Way to go by.

Ibidem. But to this it will be objected, that the late Practice hath been to let the Cauſe ſtand adjourned over, on Payment of the Coſts of the Day, and to direct the Plaintiff to amend his Bill, and make proper Parties; and in many Caſes, this is a very juſt Rule and Determination, as where the Party wanting to be brought in, is purely a Party *pro Forma*, as in the Caſe of a Truſtee, or an Executor, againſt whom there needs no further Examination of Witneſſes. And it is ſaid, that to ſupply the Want of Parties, in Caſe of an Adminiſtration *de bonis non*, Courts of Equity have directed, that, upon the Plaintiff's producing ſuch Adminiſtration, or any other Adminiſtration, or Probate of a Will before

FH
MVSEVM
BRITANNICVM

before the Officer, the Account ſhall go on.

But where the Party, which is wanting, is a ſubſtantial and neceſſary Party, and where he may controvert the Plaintiff's very Right to the Demand in queſtion; and where he may deny it by his Anſwer, and put the Plaintiff, and thoſe other Defendants, who have anſwered, to undergo a freſh Examination of Witneſſes, (for no Body will ſay that the Examination, taken before the coming in of this new Defendant's Anſwer, ſhall either bind or affect his particular Caſe) and where the Plaintiff muſt reply to this new Defendant's Anſwer, and where both Parties muſt examine all over again, *de novo*, and where the Cauſe muſt alſo be ſet down, *de novo*, as againſt this new Defendant, it is not conceived of what Effect it can be to the Plaintiff to have his Cauſe ſtand over, or where he is to find his Account in the Event of ſuch Proceeding: And it ſeems, in this Caſe, to be more juſt, that the Bill ought to ſtand diſmiſſed with Coſts, and that the Defendants, who are unneceſſarily brought on, ſhould at leaſt have their Coſts for this Vexation, and that the Plaintiff ought to be at Liberty to bring a new Bill, and make proper Parties as he ſhall be adviſed: But all this is in the Breaſt of the Court to do as they pleaſe. See 1 *Williams*, 428. Ibidem.

For

For the further Proceedings, in order to bring the Cauſe on again, where it is Ordered to ſtand over for want of Parties, See *Title Hearing.*

They only are Parties to a Bill againſt whom Proceſs is prayed.

The Plaintiff made ſeveral Parties to his Bill, but omitted praying Proceſs againſt ſome of the moſt material: The Defendant pleaded to the Bill, the Want of Parties; Lord Chancellor ſaid, the Plaintiff may complain and tell Stories, of whom he pleaſes, but they only are Defendants againſt whom Proceſs is prayed, and no Proceſs being prayed againſt ſome of the Parties, they ſtill are not Defendants, conſequently, the Plea is good. 1 *Williams*, 593.

If a Party be proſecuted to a Sequeſtration, the Cauſe may be carried on without him.

If one of the Defendants is proſecuted to a Sequeſtration, the Cauſe can be carried on without him. *Mich.* 1699. between *Parker* and *Blackburn*. *Bac. Equ. Ca.* 73.

All Perſons having joint Intereſts, and all Executors, &c. are to be Parties.

If two or more have a joint Intereſt regularly, they muſt be all Parties to the Bill; ſo if two or more are liable to a Demand, you cannot proceed againſt one alone. 2 *Vern.* 195. So all Executors, Truſtees, or their Repreſentatives, are to be made Parties: But this Rule may be diſpenſed with, if any of them are not amenable, or if they have ſtood out Proceſs to a Sequeſtration. *Bac. Equ.* 72.

But

But in caſe of a Charity, it is not neceſſary that all the Ter-tenants ſhould be made Parties; for every Part of the Land is liable, and the Charity ſhall not be put to that Difficulty: But the Ter-tenants may, if they ſeek a Contribution, undertake to make them Parties to the Information, or help themſelves, by ſuch Courſe, as they ſhall think fit. 1 *Salk.* 163. Attorney-General againſt *Shelly*, 1 *Williams*, 599. A Charity ſhall not be put to that Difficulty.

If a Perſon claims any Thing due from the Teſtator, the Executor muſt be made a Party. *Nel. Ch. Rep.* 334; and where there are ſeveral Executors, they muſt all ſue, and be ſued. 3 *Ch. Rep.* 92. Executors to be Parties in all Caſes.

If a Legatee of a Term ſues for it, he muſt make the Executor a Party, although he alledges he has his Aſſent; between *More* and *Blagrave*. 1 *Ch. Ca.* 277. Ibidem.

So, if an Executor does actually releaſe, yet he muſt be made a Party to the Suit. *Hillary* 1681, between *Smithby* and *Hinton*. 1 *Vern.* 31. Ibidem.

But if the Plaintiff ſues one Executor, and alledges, in his Bill, that he does not know who the other Executor is, and prays a Diſcovery, this will be no Unleſs the Bill prays a Diſcovery of an Executor.

no Cauſe of Demurrer. Ruled *Mich.* 1682, between *Boyer* and *Covert.* 1 *Vern.* 95.

Bill againſt Executors in Truſt, *Ceſtuique truſt*, or reſiduary Legatee, not be Parties.

If a Bill be to be relieved, touching a Leaſe for Years, or other perſonal Duty againſt Executors, though the Executors be but Executors in Truſt, yet it is not neceſſary to make the *Ceſtuique truſt*, or reſiduary Legatees, Parties. 1 *Vern.* 261.

Bill may be brought againſt one Executor only, for Diſcovery of his own Receipts and Payments.

The Plaintiff, being reſiduary Legatee, brought his Bill againſt the Defendant, who was one of the Executors (without his Co-executor who was beyond Sea) to have an Account of his own Receipts and Payments; the Defendant inſiſted that his Co-executor ought to be made a Party; but Lord Chancellor ordered the Cauſe to go on, and ſaid, that if any Thing appeared difficult on the Account, the Court would take Care of it; and as a Bill may be brought againſt one Factor, without his Co-factor, being beyond Sea, that the ſame Reaſon held here. *Mich.* 1698, between *Cowſlad* and *Cely.* *Bac. Eq. Ca.* 73.

Obligors, how to be ſued in Equity.

If any one ſue in Equity an Executor of an Obligor, to diſcover Aſſets, all the Obligors muſt be made Parties, that the Charge may lie equal, 2 *Vent.* 348. The Reporter adds a Quære, whether the Principal may not be ſued without

thoſe who are bound as Sureties. *Vide Nel. Ch. Rep.* 105, where it is held not to be neceſſary to ſue all the Obligors, and that any one who is compelled to pay the Money, may compel others to contribute.

But it is clear, that if a Judgment be had at Law againſt one Obligor, you may ſue the Executor of him alone, to diſcover Aſſets, *&c.* becauſe the Bond is drowned in the Judgment. 2 *Vent.* 348. 2 *Ch. Ca.* 29. *S. P.* Ibidem.

But in the Caſe of *Collins* and *Griffith*, 2 *Williams*, 313, it was determined, that if two Obligors are bound in a Bond, jointly and ſeverally, and one dies, the Executor of the deceaſed Obligor, may be ſued in Equity for the Debt, without making the ſurviving Obligor a Party; for otherwiſe, there would be no Difference in Equity between a Joint-bond, and one joint and ſeveral; and what was intended to ſtrengthen the Security, would tend to hurt it extremely; but he may compel the other Obligor to contribute towards Payment of the Debt. Executors of one Obligor may be ſued, where two are bound jointly and ſeverally.

It is ſaid that the Heir may be ſued alone for the Payment of a Bond Debt, if the Repreſentative is out of the Kingdom, and the Heir ought not to demur; becauſe the Repreſentative of the perſonal Heir may in ſome Caſes be ſued for the Payment of the Debt of his Anceſtor, without making the Executor or Adminiſtrator a Party.

ſonal Eſtate is not a Party, for it is not a Thing of abſolute Neceſſity; but there are ſeveral Excuſes, which the Court are to judge of at the Hearing; as that he is beyond Sea, not to be found, or the like. 1 *Williams*, 684. See *Moſeley*'s *Rep.* 85. *Daranda* againſt *Whittingham*, *Mich.* 1728.

Ibidem. And in the ſame Caſe, although it was allowed to be the ſtanding Rule of the Court, that the perſonal Eſtate is to be applied firſt to pay Debts; and therefore, the Repreſentative of the perſonal Eſtate, is to be a Party, becauſe he might ſhew he had ſatisfied the Debt; yet this Rule was diſpenſed with, and a Demurrer put in by the Heir of the Obligor, becauſe his Adminiſtrator was not a Party, was over-ruled: But in this Caſe, the Defendant, who had the Right, oppoſed the Plaintiff in taking out Adminiſtration, and would not diſcover where the Inteſtate died, or adminiſter to him. 1 *Vern.* 95. 2 *Vern.* 195.

The Heir of the Deviſor to be a Party to a Bill brought againſt the Deviſee on the Stat. 3 and 4 *William* and *Mary*, to affect the real Aſſets in his Hands, and to ſubject him to the Debt.

One ſeized of Lands in Fee, binds himſelf and his Heirs in a Bond, and deviſes his Lands to *I. S.* in Fee, and dies. In a Bill brought upon the * 3d and 4th of *William* and *Mary*, ch. 14, *Eng.* to effect the real Aſſets in the Hands

* 4 *Ann.* ch. 15. *Iriſh.*

Hands of the Deviſee, and to ſubject him to the Payment of the Debts; Lord Chancellor ſaid, the Deviſor's Heir muſt be made a Party; for it is the Act of Parliament makes this Aſſets in the Deviſee's Hands, and that requiring the Heir to be made a Defendant, the Remedy therein preſcribed muſt be followed, and this Bill in Equity is as an Action at Law; otherwiſe, if there were no Heir: And perhaps it might be otherwiſe too, if the Bill had charged, that the Plaintiff had made Inquiry, and could find or diſcover no Heir. 1 *Peer Willams*, 100.

Grantee of Rent-charge muſt make all the Purchaſers Parties.

If a Man grants a Rent-charge, and afterwards ſells the Lands by Parcels, and the Grantee ſues for the Rent, he muſt make all the Purchaſers Parties. *Cary*, 3. 33.

A Truſtee for three cannot be called to an Account by one without making the reſt Parties.

The Bill being to have an Account of a Truſt, the Defendant pleaded, that he was intruſted for three Children, *viz.* for the Plaintiff and his two Brothers, and that the other two not being made Parties to the Suit, he was not bound to anſwer; for otherwiſe, he might be thrice called to an Account for the ſame Matter, and the Plea was allowed; *Mich.* 1682, between *Hana* and *Stevens*. 1 *Vern.* 110.

But

But one Legatee may ſue without the others.

But if *A.* deviſes ſeveral Legacies to *B. C.* and *D.* and that if his Eſtate fell ſhort, each to abate in Proportion; in this Caſe, one alone may ſue for his Legacy, and it is not neceſſary that the other Legatees ſhould be made Parties. *Mich.* 34. *Car.* 2, between *Haycock* and *Haycock*, 2 *Ch. Ca.* 124, though one Legatees may ſue; yet if the Reſidue of the perſonal Eſtate be deviſed to three, *Q.* whether one of them alone, may ſue for his Part; and *vide Nel. Ch. Rep.* 243, where it is held that he cannot.

Plaintiff at Law to be made a Party to a Bill, to be relieved againſt a Bail-bond, aſſigned by the Sheriff, by Fraud.

If a Bill be exhibited againſt the Sheriff and Plaintiff at Law, to be relieved againſt a Bail-bond aſſigned by Fraud, by the Sheriff, let the Proof of the Fraud be never ſo ſtrong; yet if the Plaintiff at Law is not ſerved with an Order to anſwer, ſo as to be made a Party, the Plaintiff can have no Relief: Ordered by the Maſter of the Rolls. *Mich.* 1682, between *Izrael* and *Narbourne*. 1 *Vern.* 87.

All Perſons named in a Covenant, muſt be Parties, otherwiſe on a Promiſe.

Upon a Bill for the ſpecifick Performance of a Covenant, under Hand and Seal with *A.* for the Benefit of *B. A.* muſt be made a Party to the Suit; but if it had been only a Promiſe, either *A.* or *B.* might have brought the Action, according to the Caſe in *Yelverton*'s Reports,

ports, *Hill.* 1638, between *Cook* and *Cook.* 2 *Vern.* 36.

In a Bill to be relieved againſt an Award, made by ſome of the Members of the *Eaſt-India* Company, touching the *quantum* of Freight, due to the Plaintiff from the Company, the Arbitrators and ſome of the particular Members being made Defendants, they demurred to the whole Bill; becauſe the Plaintiff could have no Decree againſt them, and their Anſwers would be no Evidence againſt the Company, and the Plaintiff might examine them as Witneſſes; and the Demurrer was allowed, without putting them to anſwer, as to to Matters of Fraud and Contrivance. *Trinity* 1700, between Doctor *Stewart* and the *Eaſt-India* Company. 2 *Vern.* 380.

Perſons againſt whom no Decree can be obtained, may demur, if made Parties.

A. having outlawed *B.* brings a Bill againſt *B.* and *C.* a Truſtee for *B.* with Reſpect to an Annuity, to ſubject this Annuity to the Plaintiff's Debt; and it was objected at the Hearing, that this Bill did not lie, all the Defendant's Eſtate being forfeited to the Crown. The Court declared, that foraſmuch as by the Outlawry, all the Defendant's Intereſt, as well equitable, as legal, was forfeited to the Crown; and though the Plaintiff was intitled to a Grant thereof from the Crown, which upon Appli-

Where a Perſon outlawed is ſued, the Plaintiff muſt ſhew his Title, and make the Attorney General a Party to the Bill.

cation to the Court of *Exchequer*, he would of courſe have; yet ſince the Truſt continued in the Crown, until taken out, they directed the Plaintiff to get ſuch Grant, and make the Attorney General a Party, and then to come again. 1 *Williams*, 446. The Defendant might have demurred to the Bill, in Regard the Plaintiff ſhewed no Title to the Annuity. See 2 *Williams*, 269.

If a derivative Mortgagee files a Bill againſt the Mortgagor, the firſt Mortgagee or his Repreſentative muſt be a Party.

A. made a Mortgage for 500*l.* to *B.* for ſecuring 350*l.* and Intereſt, *B.* aſſigns the Term to *C.* redeemable by himſelf, on Payment of 300*l.* *C.* brings a Bill againſt *A.* to redeem, or be foreclоſed; *B.* the original Mortgagee, or in caſe of his Death, his Repreſentative ought to be made a Party. 2 *Williams*, 643.

A Bill brought by a Mortgagee againſt the Heir of a Mortgagor to foreclоſe, the Executor of the Mortgagor need not generally be made a Party.

It has been held, that in all Caſes, where a Bill brought by a Mortgagee, againſt the Heir of a Mortgagor, to foreclоſe, the Executor of the Mortgagor ought to be a Party; becauſe otherwiſe, it did not appear but that he might have paid the Debt: Beſides, the perſonal Eſtate is to contribute to, and eaſe the real Eſtate in Favour of the Heir. But it was determined in the Caſe of *Dunſcombe* againſt *Henſley*, *Eaſter* Term, 1720, by the Maſter of the Rolls, that there is no Neceſſity for making

making the Executor of the Mortgagor, a Party; becauſe the Bill being only to foreclose the Equity, the Plaintiff need only make him a Party, who has the Equity, *viz.* the Heir, and that the Courſe is ſo: Neither is the Plaintiff the Mortgagee, any ways bound to intermeddle with the perſonal Eſtate, or to run into any Account thereof; and if the Heir would have the Benefit of any Payment, made by the Mortgagor, or his Executor, he muſt prove it. See 3 *Williams*, 333. The like Determination was made in the Court of *Chancery* in this Kingdom, in the Caſe of Lord *Gowran* againſt *Stepney Rawſon*, *Trinity* 1738. This Proceeding of bringing the perſonal Eſtate, in Aid of the real Eſtate, in Favour of the Heir, might have prevailed in the Times of the feudal Tenures, that he might be the better enabled to perform the Services of the Feud; but as theſe Tenures have been long ſince aboliſhed, it is thought this Reaſoning, from thence, ſhould in this Reſpect, have ceaſed of courſe.

But in the Caſe of *M'Clenahan* againſt *Magee*, in this Court, *Trinity* Term, 1747; the Plaintiff, as Heir at Law to the Mortgagor, brought a Bill to redeem: It appeared on the Hearing, that the Mortgagee had been ſeveral Years in the Poſſeſſion of the mortgaged Premiſſes,

But if there has been a mixed Poſſeſſion between the Mortgagor and Mortgagee, and the Mortgagor and Mortgagee die, on a Bill brought by the Heir of the Mortgagor to redeem, the Re-

preſentative of each muſt be before the Court.

miſſes, and in the Perception of the Rents and Profits, and it alſo appeared that the Mortgagor at ſeveral Times interrupted the Mortgagee's Poſſeſſion, and received part of the Rents, and it was charged by the Bill, that the Mortgagee had, in the Life-time of the Mortgagor, received more than ſufficient to pay off the Mortgage-money: But the Plaintiff had not made the Executor or Adminiſtrator of the Mortgagor a Party; wherefore the Court ordered the Cauſe to ſtand over, with Liberty to the Plaintiff to amend his Bill.

The Reaſons.

The Reaſons given by the Court, why the Executor or Adminiſtrator of the Mortgagor was a neceſſary Party, were; that if the Mortgagee had received more out of the Premiſſes than ſufficient to diſcharge the Mortgage-money, the Executor or Adminiſtrator of the Mortgagor, only had a Right to call the Mortgagee or his Repreſentative to an Account for it; and if he had not received ſufficient, and the Executor or Adminiſtrator of the Mortgagor was not a Party to the Account, yet he may at any Time file his Bill, and charge that the Mortgagee was ſatisfied by the Perception of the Rents and Profits; ſo that the Mortgagee or his Repreſentative, might be haraſſed by various Suits; and the Repreſentative of the Mortgagee muſt alſo be a Party; for if the Mortgagee had received more than ſufficient to pay off

off the Mortgage-money, his Repreſentative muſt anſwer it out of his Aſſets.

A Truſtee may in ſome Caſes ſue in his own Name, but ordinarily the *Ceſtui-que Truſt*, muſt be made a Party. 1 *Har. Ch. Pract.* 3d Edit. 255.

Where a Truſtee ſues in his own Name, the *Ceſtuique Truſt*, to be a Party.

The Defendant may demur for want of Parties to the Plaintiff's Bill, and this as well at the Hearing, as before Anſwer; for the Court cannot make a proper Decree, where all Perſons who are to be bound by it, are not before the Court. See *Title Hearing*, and *Title Demurrer.*

Demurring may be for want of Parties before Anſwer, or at the Hearing.

In the Caſe of *Wills* and his Wife, againſt *Holt*, and others in this Court, 16th *July* 1750, it was determined upon Motion, that where there are neceſſary Parties to be ſerved, who are in foreign Parts, and that there can be no inferior Service, the Court upon proper Affidavits thereof, will on Counſel's Motion, upon Notice, give the Plaintiffs Leave to bring on his Cauſe againſt the Defendants, who are before the Court; and Mr. Prime Serjeant ſaid, the like Order was lately made in *Chancery*, in the Caſe of *Archbold* againſt *Archbold*, and in this Court in the Caſe of *Barlow* againſt *Harris.*

The Court will give the Plaintiff Leave to bring on the Cauſe againſt ſome of the Defendants, when the other Defendants are in foreign Parts, and cannot be ſerved.

Where two or more are liable to a Demand, one alone ſhall not be proceeded againſt.

It is a Rule in Equity, where two or more are liable to a Demand, you ſhall not proceed againſt one alone, but ſhall bring all the Perſons liable before the Court. 2 *Vern.* 195.

Matters proper by a Bill in Equity.

Affidavit where Relief is demanded, neceſſary in ſome Caſes.

CARE muſt be taken in the Bill, that the Plaintiff of his own Shewing, hath not a Remedy at Law, for that will be a good Cauſe of Demurrer, for this Reaſon: In ſome Caſes, there muſt be an Affidavit to the Bill, where Relief is demanded, *quod vide antea*, under *Title Demurrer.* But Fraud is properly cognizable in a Court of Equity, becauſe it lies in the Dark, and is diſcoverable by the Oath of the Defendant himſelf, and therefore, though an Action of the Caſe lay upon the Fraud, yet it is proper for a Bill in Equity.

Where the Matter of a Bill is merely in Damages, the Remedy is at Law; but if Fraud is mixed with them, the Chancellor will retain the Bill till the Damages are

And here it is a general Rule, that where the Matter of a Bill is merely in Damages, there the Remedy is at Law; becauſe the Damages cannot be aſcertained by the Conſcience of the Chancellor, and therefore muſt be ſettled by a Jury at Law; wherefore, the *Chancery* never tries the *quantum* of the Damages

in a *quantum damnificatus*, where there is a demurrer to the Bill, unleſs there be a matter of Fraud mixed with the Damages; as if *A.* ſues *B.* in a Covenant at Law, for Damages, and *B.* files a Bill for an Injunction, upon this equitable Suggeſtion, that the Covenant was obtained by Fraud; if *A.* files his Croſs Bill for relief upon the Covenant, the Court will retain it; becauſe the validity of the Covenant is diſputed in that Court, and on a Head properly cognizable there; and therefore, if the validity of the Deed be eſtabliſhed, the Court will direct an Iſſue for the *quantum* of the Damages.

aſcertained by a Jury, on a leading Order.

But a Man comes properly before a Court of Equity for the ſpecifick Performance of a Covenant; becauſe a Man is in Conſcience obliged to perform his own Contract in Specie: And therefore, the Relief at Law, which only gives Damages for the Breach, or Non-performance is inadequate, and conſequently the Plaintiff is proper in Equity for that ſpecifick Performance which he cannot obtain at Law, and therefore the Court retains ſuch Bills.

A Bill in Equity, is proper for the ſpecifick Execution of a Covenant.

But here a diſtinction is to be obſerved, that where the common Law would give the ſame Relief, as a Court of Equity, there, if the Defendant deny the Deed, and demur to the Relief, the Demurrer will be allowed. As if the Co-

Where there is the ſame Relief upon a Deed at Law, as in Equity, the Defendant muſt deny the Deed, and demur to the Relief, if he

would have the Cauſe tried at Law; for if he anſwers and does not Demur, he allows the juriſdiction of the Court, and they muſt then Decree, *ſecundum æquum & bonum.*

venant were to pay a Sum certain, and the Deed be denied, the Defendant hath a right to try it by a Jury; and there being the ſame relief at Law in this Caſe, as in Equity, to avoid Circuity, the Cauſe ought to be diſmiſſed, and left at Law; and the rather becauſe Equity doth not relieve where the Plaintiff hath the ſame relief at Law: But if the Defendant doth not demur to Relief, but anſwers, and the Deed denied by the Anſwer is proved in the Cauſe by two Witneſſes, the Court will Decree for the Plaintiff on the Hearing; but if it be proved only by one Witneſs, there the Court grants a leading Order to try it at Law, and then the Parties come back on the Equity reſerved; becauſe the Defendant admitted the Juriſdiction, by anſwering and putting it in Iſſue, and not demurring thereunto.

Where the Relief ſought is for a Duty, and not a Debt, or for the doing a Thing in Specie, the Defendant cannot demur, though he denies the Deed.

But where the Covenant is not for Payment of Money, but for the doing of a Thing in Specie; as conveying Lands, executing Deeds, *&c.* there, though the Defendant denies the Deed, yet he cannot demur to the Relief; becauſe the Plaintiff ſeeks a different Relief (and is intitled to it if the Deed be good) from what the Law can give him; and therefore the Plaintiff's Suit is well inſtituted in the Court, ſince he muſt come back for that Relief to Equity, after the Deed is eſtabliſhed at Law.

Secondly,

Secondly, where Conveyances are defective, if they be upon valuable Conſideration, the Court of Equity will oblige the Vendor or Mortgagor to make good the Defect; becauſe it is according to Conſcience, that he ſhould make good his own Agreement or Contract; and this, as well where there are Covenants, as where there are not: But where there is a defective Conveyance, without an equitable Conſideration, a Court do not in the general, oblige the Vendor or Mortgagor to make good the Conveyance, although there be be a Covenant for further Aſſurance.

In what Caſes the Vendor or Mortgagor ſhall make good a defective Conveyance,

The Court of *Chancery* will not retain a Suit by *Engliſh* Bill, under ten Pound value, except in Caſes of Charity, nor under the value of forty Shillings *per Annum* in Lands. *Bac. Equity Ca.* 75.

Bill not admitted for Goods, &c. under 10*l.* value, or under 40*s.* a Year in Land.

If a Bill is brought for a Sum under ten Pounds, the Defendant may either demur to the Bill, or move to have it diſmiſſed, as below the dignity of the Court. See *Moſeley's Rep.* 356.

Bill for a Sum under 10*l.* may be demurred to, or diſmiſſed on Motion.

But it is ſaid, that where there is a Fraud, or it is a complicated Matter, the Bill will be retained, though the Sum be never ſo ſmall. See *Bunbury's Rep.* 17.

Unleſs there be a Fraud, or the Matter be complicated.

An

The Court will not take Notice of a Sum originally below the Dignity of the Court, though by the neglect or miſmanagement of the Party, it has amounted to a larger.

An Action was brought at Law, for five Pounds, which by letting Judgment go by default, was encreaſed to fifteen Pounds, and the Defendant filed a Bill and moved for an Injunction, which was denied by the Maſter of the Rolls, who declared, he had lately diſmiſſed a Bill on the ſame Account, becauſe the Sum was originally below the dignity of the Court, though by the neglect or miſmanagement of the Party, it had amounted to a Sum, the Court would take Cognizance of. *Bunbury's Rep.* 47.

A Bill lies to ſet aſide Letters Patents, obtained by Fraud.

A Bill in Equity lies to ſet aſide Letters Patents obtained by Fraud. Attorney General ver. *Vernon.* 1 *Vern.* 277.

By a *Soliciter* for Fees.

A Solicitor may have a Bill for Fees only, if for Buſineſs done in this Court; and ſo he may when the Buſineſs is done in another Court, if it relates to another Demand the Plaintiff makes in this Court. 1 *Vern.* 203.

Suit not proper for ſmall Tithes.

A Suit for ſmall Tithes not proper for *Chancery*, neither has it beeen uſed; *per* Sir *John Churchill* as *Amicus Curiæ.* 2 *Ch. Ca.* 257. See a late Act for recovering them by Civil Bill.

Bill by an Executor againſt ſeveral Creditors of his Teſtator, in order to ſettle

The Plaintiff being Executor, and his Teſtator greatly indebted, and being deſirous to be rid of the Aſſets, as far as they would go, and that his Payments might

might not be afterwards queſtioned, brought a Bill againſt all the Creditors, to the intent, they might, if they would conteſt each others Debts, and diſpute who ought to be preferred in Payment; the Defendant being a Creditor, demurred, for that the Bill contained multiplicity of Matter, wherein he was not concerned; but the Court over-ruled the Demurrer, and held it a proper Bill, and a ſafe Way for an Executor to take. *Hillary*, 1688, between *Buckle* and *Atleo*. 2 *Vern.* 37.

the ſeveral Debts for payment, as far as the Aſſets would reach.

If *A.* obtains a Decree before the Ordinary, for a Pew in a Church, and he brings a Bill for the Decree of this Court, to quiet him in the Poſſeſſion, the Bill will be diſmiſſed with Coſts; for this Court executes not it's own Decrees by Bill, without examining the Juſtice of them, and we cannot examine whether the Biſhop hath done right; nor will ſuch a Decree bind the Succeſſors. 2 *Vern.* 226.

Bill lies not to execute the Decree of another Court.

Formerly, where two Bills were for one and the ſame Matter, the Practice was to plead to the ſecond Bill; but this Method being found both tedious and expenſive, it was altered, and the Practice of referring the two Bills to a Baron, was ſubſtituted for the eaſe of the Suitor; ſo that now if a Bill be depending in this Court, and the Plaintiff files another Bill for the ſame Matter, the

Two Bills in this Court for the ſame Matter, the Defendant may move to have them referred, and one diſmiſſed.

the Court on motion of the Defendant's Attorney will refer it to a Baron, to inſpect the two Bills, and after ſuch Reference, and on Report of the Contents of both Suits, and on Counſel's Motion thereon, and on conſideration of the Matter, the Court will order the retaining or Diſmiſſion of the new Bill according to the Juſtice, and the nature of the Caſe; and if the new Bill in this Court be diſmiſſed, the Defendant ſhall have his Coſts, and the like remedy for them as in other Caſes of Diſmiſſions before Hearing. And further, if the firſt Bill was in *Chancery*, he may ſtop the Plaintiff in his Suit in *Chancery*, until he pays the Defendant the Coſts of the Diſmiſſion in this Court. But it is ſaid, if a Bill be diſmiſſed in *Chancery*, and then filed here, the Defendant cannot diſmiſs it on Motion, but muſt plead to it; and then it is to be referred to the Officer. See *Moſeley's Rep.* 268.

But if a Bill be diſmiſſed in *Chancery*, and then filed here, he cannot diſmiſs it on Motion, he muſt plead to it.

A Cauſe may be diſmiſſed for Vexation, by Reaſon of a double Proceeding; as if the Plaintiff firſt brings an Action at Law, and then his Bill in this Court, for the ſame thing, *&c.*

Suit at Law for the ſame Matter for which a Bill is filed in Equity.

And in this Caſe, when the Defendant hath anſwered, the Court upon Motion of his Attorney, and upon his ſuggeſting, that the two Suits are for the ſame Demand, will make an Order for the Plaintiff to make his Election, if

And the Proceedings to compel the Plaintiff to make his Election and to pay the Coſts.

if he will proceed at Law, or in Equity, unleſs Cauſe be ſhewn to the contrary in four Days after Service of the Order, and to ſtop in the mean Time.

And this Order is to be ſerved on the Attorney for the Plaintiff at Law, and in Equity; and if the Plaintiff neglects or refuſes to make ſuch Election in four Days after Service of the Order, or if, notwithſtanding the Order, he proceeds without making his Election, then upon Motion of the Plaintiff's Attorney, the Bill ſhall be diſmiſſed with Coſts; and if the two Suits are depending in this Court, on proper Application by Counſel, the Court will ſet aſide ſuch intermediate Proceedings, be they in the Law or the Equity Side thereof. Ibidem.

And the Plaintiff is to make his Election by his Attorney in open Court, and is at the ſame Time to move for Liberty to proceed, either at Law or in Equity, according as he makes his Choice; and he is forthwith to pay to the Defendant the Coſt of the Suit, in that Court where he has dropt his Proceedings, or the Court on Motion of the Defendant's Attorney, in Caſe the two Suits be in the *Exchequer*, will make an Order that the Plaintiff ſhall ſtop his Proceedings, be they at Law or in Equity, until he diſcharges ſuch Coſts: And if the Plaintiff's Suit at Law has Ibidem.

has been inſtituted in ſome other Court, and that he elects to proceed at Law, but neglects or refuſes to pay the Coſts as aforeſaid, in ſuch Caſe, this Court will diſmiſs his Bill with taxed Coſts, for which he may iſſue an Attachment.

Ibidem. So at the Law Side of this Court, where a Bill hath been filed in *Chancery*, and a Suit at Law is commenced in this Court for the ſame Matter, and the Plaintiff elects to proceed at Law, but pays not the Defendant the Coſts in *Chancery*, this Court will on an Attorney's Motion, ſtop the Proceedings at Law, until the Coſts in *Chancery* be paid: If he elects to proceed in *Chancery*, and pays not the Coſts at Law, the Court on Motion of the Defendant's Attorney, will award an Attachment for it, as is uſual. See *Title Coſts.*

Ibidem. And note, where the two Suits at Law, and in Equity, for the ſame Matter, have been inſtituted in this Court, theſe Motions to elect, are uſually made on the Equity Side thereof.

Ibidem. In 3 *Williams* 90, it is declared by Sir *Joſeph Jekyl*, Maſter of the Rolls, *Mich.* 1723, anonymous, that it is provided by the Order for Election, that if the Plaintiff ſhall elect to proceed in *Chancery*, then the Proceedings at Law, are by that Order to be ſtayed by Injunc-

tion. But if the Plaintiff ſhall elect to proceed at Law, or ſhall make Default in electing by the Time preſcribed by the Order, his Bill is to be diſmiſſed with Coſts; and that if one makes a ſpecial Election to proceed at Law as to Part, and in Equity as to Part, with regard to what the Plaintiff in Equity elects to proceed at Law for, his Bill ought to be diſmiſſed with Coſts.

If the Plaintiff makes his Election, to proceed at Law, and meets not with Succeſs at Law, he may reſort back again to a Court of Equity; for a diſmiſſion upon an Election to proceed at Law, is no more peremptory, than a Non-ſuit at Law. So held in the Caſe of the Counteſs of *Plymouth* and *Bladen*. 2 *Vern.* 32.

Plaintiff after Election may reſort back to the Court he left, if he ſucceeds not in the Court he elected to proceed in.

So if he makes his Election to proceed in Equity, and his Bill is diſmiſſed, for that he hath not Remedy there, he may reſort back again to Law, but before he proceeds again at Law, it will be proper to have a Rule for that Purpoſe; ſo held in the Caſe of *Verner* againſt *Averel* in this Court, *Hillary*, 1748.

Ibidem.

Theſe double Vexations ſhould meet with great Diſpleaſure from Courts of Juſtice, and eſpecially the Attornies or Agents

Theſe double Vexations to be diſcouraged.

Agents concerned for the Plaintiff, in ſuch Suits; for when a Plaintiff, or they who are concerned for him, find that they have miſtaken the Court in which their Remedy lies, they ſhould either move to diſmiſs their Bill, or diſcontinue at Law, as they are adviſed, paying the Defendant his Coſts, and not to Multiply unneceſſary Suits and Coſts.

Plaintiff may file a Bill for Diſcovery only, and in aid of his Suit at Law.

But note, a Plaintiff may file a Bill in Equity for Diſcovery only, and in Aid of his Suit at Law, and in this Caſe, he ſhall not be put to his Election. See *Title Anſwer, Plea, and Demurrer.* See alſo *Title Witneſſes, Evidence and Proof*; and *The Proceedings on Rules for Diſcovery of Evidence.*

Or may bring an Ejectment at Law for the Land, and proceed in Equity on the Account for the Profits.

So if a Man has made his Election to proceed at Law, or in Equity, and the Bill is for Land, or meſne Profits, he may elect to proceed in an Ejectment at Law, for the Poſſeſſion, and in Equity upon the Account; becauſe at Law he can recover Damages for the meſne Profits, from the Time only of the Entry laid in the Declaration. 1 *Vern.* 105.

Things of diſtinct Natures joined in one Bill againſt different Defendants, the Bill is nought.

A Bill if it concerns Things of diſtinct Natures, and is brought againſt ſeveral Perſons, which will occaſion ſeveral Anſwers and Examinations, is nought; beſides each Party would be obliged to take Copies of what no way con-

concerned his own Cauſe, whereby his Charge would be encreaſed to no Purpoſe. Reſolved upon Demurrer, 15 *Cha.* 2. between *Berk* and *Harris*. *Hard.* 337.

But where Defendant demurred, becauſe the Plaintiff's Bill was brought againſt ſeveral Defendants, for ſeveral diſtinct Matters, yet the Demurrer was over-ruled, becauſe the Plaintiff by his Bill had charged the Defendants with Combination, which the Defendant had not denied by Anſwer. *Mich.* 1686, between *Powell* and *Arderne*, 1 *Vern.* 416: For the Combination being a Charge which extends to all the Defendants does, (if not denied) ſo tie and link all other Charges contained in the Bill, that makes it neceſſary to make them all Parties.

But not where the Bill charged Combination, which the Defendant had not denied.

Where a Man demurs, for that the Bill contains ſeveral Matters not relating one to the other, and in ſome whereof the Defendant is not concerned, if by Anſwer the Defendant doth more than barely deny Combination and Confederacy, he over-rules his Demurrer. *Trin.* 1687, between *Heſter* and *Weſton*. 1 *Vern.* 463.

Defendant by his Anſwer is only to deny Combination and Confederacy.

Yet ſometimes for avoiding multiplicity of Suits, and to bring all Parties who may be affected, before the Court, the

In ſome Caſes, it may be againſt diverſe Parties, who have ſeparate Rights and Intereſts.

Suit may be by or againſt diverſe Parties, who have ſeparate Rights and Intereſts, as Deviſees, Creditors, and the like.

Bill of Exchange accepted and loſt, the Court decreed the Money on Defendant's being indemnified.

A Bill of Exchange was accepted and loſt, Plaintiff brought his Bill for the Money, and on making Affidavit and giving Security to indemnify the Defendant, the Court decreed the Money to be paid. *Finch*, 301.

When the *Chancery* cannot relieve, the Parliament will direct.

When the *Chancery* (according to Rule) cannot Relieve in a juſt Cauſe, the Parliament will give ſpecial directions for Relief. 1 *Ch. Ca.* 205.

Bill for Diſcovery of Aſſets, and Relief when allowed.

In the Caſe of *Williams* againſt *Williams*, and *Depuis* againſt the Duke of *Kingſton*, *Bunb. Rep.* 29, a Bill to diſcover Aſſets, which likewiſe prayed Relief, was allowed: But note, in both theſe Caſes, the Defendant had joined in Commiſſion; whereas if he had demurred to the Relief, it ſeems the Demurrer would have been good. But at the Bottom of the Page there is a Note, that in the Caſe of *Alpot* and others, againſt *Thompſon* and others, *May* 5, 1726, Lord Chief Baron *Gilbert*, declared the ſolid Diſtinction, "That where "an Executor, or Adminiſtrator, con-"feſſes a liquidated Debt, there, Diſ-"covery ſhould draw Relief, otherwiſe "not."

A Bill was preferred to eſtabliſh the Plaintiff's Right to Common, and ſet aſide ſeveral former Decrees: The Defendant demurred to the whole Bill; for if there was any Error in the former Decrees, the Plaintiff ſhould have brought a Bill of Review, and not to have taken this Method, and the Demurrer was allowed. *Ibid.* 56.

Bill of Review when it ought to be brought.

A Bill may be to be relieved againſt a Judgment at Law, though the Matter ſuggeſted was a proper Defence at Law, if ſuch Matter of Defence hath come to the Knowledge of the Plaintiff, or hath been in his Power only ſince the Trial; and in ſuch Caſe, an Injunction hath been granted to ſtay Execution on the Judgment. 1 *Vern.* 176. *Bunbury's Rep.* 178, 179.

Bill to be relieved againſt a Judgment at Law, though the Matter ſuggeſted was a proper Defence at Law.

Of Bills of Diſcovery on the ſeveral Acts of Parliament, in Ireland, *againſt the further Growth of* Popery.

BY the Statute 9 *Will.* 3. ch. 28. if any Proteſtant Maid or Woman unmarried, being Heir apparent to her Anceſtor, or having a Sole or Joint-eſtate, or Intereſt in Fee-ſimple, or in Fee-tail, or being ſeized in Fee-

Proteſtant Women having real Eſtates, &c. or perſonal Fortunes amounting to 500 *l.* marrying Papiſts, the Forfeitures and Penalties,

ſimple, or in coparcenary, or in common, or being ſeized of an Eſtate for Life or Lives, by way of Jointure, Dower or otherwiſe, or being poſſeſſed of, or intitled unto any beneficial Intereſt, or Term of Years, of, or in any Manors, Lands, *&c.* in Poſſeſſion, Reverſion or Remainder, or being poſſeſſed of, or intitled to any perſonal Eſtate, either in Money, Stock, Plate, Jewels, or other Goods and Chattels, in Law or Equity, to the Value of five hundred Pound or more, ſhall, at any Time after the firſt of *January* next, marry or take to Huſband, any Perſon whatſoever, without having firſt obtained a Certificate in Writing, under the Hand of the Miniſter of the Pariſh, Biſhop of the Dioceſs, and ſome Juſtice of the Peace living near the Place (or any two of them) where ſuch Perſon ſhall be Reſident, at the Time of ſuch Marriage, that he is a known Proteſtant, which Certificate, ſhall alſo be atteſted under the Hands of two or more credible Witneſſes, and ſhall be granted without Fee or Reward; that then, and from the Time of ſuch Marriage, ſuch Proteſtant Perſon ſo marrying, and the Perſon ſhe ſhall ſo marry, ſhall be for ever afterwards diſabled, and rendered incapable of having or enjoying all, or any of the aforeſaid Eſtates, or Intereſts; and that the ſame ſhall go to, and be deemed to be the Right and Eſtate of the next Proteſtant

of

of the Kin, to whom the ſame would deſcend by Law, were ſuch Proteſtant Maid or Woman, and all other intervening popiſh Heirs, Executors, or Adminiſtrators, really dead and inteſtate at the Time of ſuch Marriage; and ſuch next Proteſtant of the Kin as aforeſaid, ſhall hold and enjoy the ſame in as ample Manner as the ſaid Proteſtant Maid, or Woman might have held the ſame, in Caſe this Act had never been made: And that at any Time after ſuch proteſtant Maid, or Woman, ſhall marry without ſuch Certificate as aforeſaid, it ſhall and may be lawful for ſuch Proteſtant Perſon or Perſons as aforeſaid, by any Action at Law, or other legal Means whatſoever, to ſue for and recover the ſame, as if ſuch proteſtant Perſon ſo marrying as aforeſaid, and all other intervening, *&c.* were really dead and inteſtate as aforeſaid, and as if ſuch Perſon or Perſon, ſo ſuing, were rightfully and legally intitled thereunto, as Heirs, *&c.* to ſuch Maid or Woman marrying as aforeſaid, ſhe being by ſuch Marriage deem'd dead in Law.

Other Penalties and Incapacities.

If any ſuchP roteſtant Maid, or Woman, after the firſt of *January*, 1697, marry ſuch Perſon, without a Certificate as aforeſaid; that thenceforth, ſhe and ſuch Huſband as ſhe ſhall marry as aforeſaid, ſhall for ever be incapable of being

Heir, Executor, Adminiſtrator, or Guardian to any Proteſtant, or Proteſtants; And in caſe any ſuch Proteſtant Woman as aforeſaid, is now married to a Popiſh Perſon, and hath now by Law a Title, or is choſen or appointed to be Guardian to any Proteſtant, having all or any of the ſaid Eſtates, or Intereſts; then after the ſaid firſt of *January*, ſuch Guardian ſhall be utterly incapable of being any longer ſo Guardian, or receive any of the Rents, *&c.* as Guardian, and the Right of Guardianſhip ſhall devolve to the next Proteſtant of the Kin, to whom the Eſtate of ſuch Perſons in Guardianſhip as aforeſaid, cannot deſcend (unleſs ſuch Perſon ſhall be incapable in Law, or ſhall be adjudged unfit by the Court of *Chancery* in this Kingdom,) in either of which Caſes, ſuch Right of Guardianſhip ſhall go to the next Proteſtant of Kin, who ſhall be capable and fit for the Diſcharge of ſuch Truſt, who ſhall take into his, her, or their Care, the Tuition of ſuch Perſons in Guardianſhip as aforeſaid, and receive the Rents and Profits of their Eſtates.

Proteſtant Man marrying a Papiſt, the Penalty, unleſs his Wife conforms within a Year.

If any Proteſtant after the firſt Day of *January* next (*viz.* 1697,) marry any Maiden or Woman, without having obtained a Certificate in Writing as aforeſaid, ſuch Perſon ſo marrying any Maiden or Woman, ſhall from and after ſuch

ſuch Marriage, be in Law deemed to all Intents, Conſtructions and Purpoſes, a Papiſt, or popiſh Recuſant, and ſhall for ever afterwards, be incapable of being Heir, Executor, Adminiſtrator, or Guardian to any Perſon whatſoever, as alſo diſabled to ſit in either Houſe of Parliament, and rendered incapable of bearing or exerciſing any civil or military Office, or Employment whatſoever, unleſs within one Year after ſuch Marriage, he procure ſuch Wife to be converted to the Proteſtant Religion, and ſhall obtain a Certificate under the Hand and Seal of the Biſhop of the Dioceſs, or Archbiſhop of the Province, or Chancellor of this Kingdom, that ſhe hath renounced the Popiſh Religion, and is become a Proteſtant, and ſhall procure the ſaid Certificate to be enrolled in the Court of *Chancery* in this Kingdom.

Marriage without a Certificate in the Act, if it be proved the Perſon was a known Proteſtant, the Parties not liable to any Penalty or Forfeiture.

Provided that in all Caſes where a Certificate is required by this Act (that the Perſon marrying is a known Proteſtant) if any Marriage ſhall be made without ſuch Certificate, and it can afterwards be made appear by Proof, that ſuch Perſon was a known Proteſtant; that in ſuch Caſe, they ſhall not be liable to any Forfeitures or Penalties in this Act.

Marrying Papiſts out of the Kingdom incurs the Penalties. 9 *Will.* 3.

By the Statute 2 *Anne*, ch. 6. if any Proteſtant having any Intereſt real or

perſonal in this Kingdom, ſhall after the 24th of *March*, 1703, intermarry with any Papiſt, either within this Kingdom, or out of it, and be thereof convicted by Indictment or Information, ſuch Proteſtant ſhall incur the Penalties and Diſabilities, in 9 *Will.* 3. ch. 28. as if ſuch Proteſtant had actually intermarried with ſuch Papiſt in this Kingdom, and the Offence ſhall be tried in any County of this Kingdom, wherein the Offender hath any Eſtate or Chattels real, or in the City of *Dublin*.

Certificate of a proteſtant Miniſter marrying them out of the Kingdom ſufficient.

The Certificate of a proteſtant Miniſter, by whom any Perſon ſhall be married out of this Kingdom, atteſted by a Publick-Notary, containing the Matter to be certified by the ſaid former Act, by the Perſons therein mentioned, ſhall be ſufficient, and in Lieu of the Certificate required by the ſaid former Act.

Papiſts being eighteen Years old, and not taking the Oaths, 30 *Car.* 2. in ſix Months, and continuing Proteſtants after, are incapable of inheriting any of the Eſtates purchaſed from the Grantees of the *Iriſh* Forfeitures in 1688.

By Statute 1 *Anne*, ch. 32. *Eng.* if any Perſon educated in, or profeſſing the popiſh Religion, and being under eighteen Years of Age, ſhall not not in ſix Months after eighteen, take the Oaths of Allegiance and Supremacy, and make and ſubſcribe the Declaration, expreſſed in 30 *Car.* 2. Statute 2. ch. 1. in the Courts of *Chancery*, or *King*'s-*Bench*, in *England* or *Ireland*, or Quarter-Seſſions in

in any County in *England* or *Ireland*, where he reſides, and continue to be a Proteſtant after, ſuch Perſon ſhall in Reſpect of himſelf only, and not in Reſpect of his Heirs or Poſterity, be diſabled to inherit, or take by Deſcent, Deviſe or Limitation, any of the Lands, Tenements, Hereditaments, *&c.* purchaſed from the Grantees of the *Iriſh* Forfeitures in 1688, and afterwards confirmed by the Statute 11 and 12 *Will.* 3. ch. 2. *Eng.* or Rent or Profit out of the ſame, and during his Life, or until he qualifies himſelf as aforeſaid, the next of his Kindred, who ſhall be a Proteſtant, ſhall enjoy the Premiſſes without being accountable for the Profits during ſuch Enjoyment.

Papiſts are hereby diſabled to purchaſe, either in their own Name, or in the Name of any other to their Uſe, or in Truſt for them, any of the ſaid Hereditaments, or any Rents, Intereſts, *&c.* in or out of the ſame, and all Conveyances and Truſts concerning the Premiſſes, for their Benefit, ſhall be void.

Papiſts diſabled from purchaſing any of the ſaid Lands.

Leaſes of the Premiſſes ſo granted and confirmed, ſhall be made to Proteſtants only; and if any Leaſe of the Premiſſes ſhall be made, or aſſigned to, or in Truſt

Leaſes for Lives, *&c.* to be made only to Proteſtants; and the Penalty on a Perſon accepting a Leaſe in Truſt for Papiſt, *&c.*

Truſt for a Papiſt, it ſhall be void, and as well the Perſon making ſuch Leaſe, or Aſſignment, as the Perſon to whom, or for whoſe Uſe the ſame ſhall be made (in caſe ſuch Perſon accept ſuch Leaſe or Aſſignment) or ſhall occupy the Lands, *&c.* therein contained, ſhall forfeit treble the yearly Value of the ſaid Lands, one Moiety to her Majeſty, the other to him who ſhall ſue for the ſame, in any of the Queen's Courts of Record, at *Dublin*, by any Bill, *&c.* wherein no Eſſoin, *&c.* ſhall be allowed.

Act not to make void any Cottage Leaſe, *&c.*

Provided nothing herein ſhall make void a Leaſe of a Cottage, or Cabbin, under the yearly Value of thirty Shillings to any Day Labourer.

All Sales by the Truſtees of the ſaid *Iriſh* Forfeitures to be made to Proteſtants only, and Papiſts made incapable of purchaſing.

All Sales of the ſaid Eſtates and Intereſts which by the ſaid Act 11 and 12 *W.* 3. are veſted in the Truſtees therein named, ſhall be made unto Proteſtants only; and every Papiſt is hereby diſabled to purchaſe in his own Name, or in the Name of any Perſon in Truſt for him, any Hereditaments veſted in the ſaid Truſtees, in order to the Selling the ſame, or any Intereſt in or out of the ſame, and all Conveyances and Truſts, for their Benefit, ſhall be void.

No

No Papiſt, during the Time he continues ſo, ſhall be capable to inherit, take or make Title unto, by Deſcent, Purchaſe, Limitation, Deviſe, or other Conveyance, in Poſſeſſion, Reverſion, or Remainder, the ſaid Hereditaments and Premiſſes, or any Truſt or Intereſt therein, or Profit out of the ſame; and if any Perſon profeſſing, or educated in the Popiſh Religion, not having publickly renounced the ſame, being of full Age, ſhall not in ſix Months after his Title accrues, or being under eighteen Years of Age, ſhall not in ſix Months after eighteen Years of Age, take the Oaths of Allegiance and Supremacy, and ſubſcribe the Declaration expreſſed in 30 *Car.* 2. ch. 1. in the *Chancery* or *King's-Bench*, in *England*, or *Ireland*, or Quarter-ſeſſions there, where he reſides, and continue a Proteſtant after, he ſhall be incapable in reſpect of himſelf, but not of his Heirs, to take by Deſcent, or Purchaſe, any, the Hereditaments aforeſaid, or any Rent or Profit out of the ſame, and during his Life, or until he take the Oaths, and make and ſubſcribe the ſaid Declaration; his next of Kin, being a Proteſtant, ſhall enjoy the Premiſſes, without being accountable for the Profits by him received, during ſuch Enjoyment.

Papiſts diſabled from inheriting, taking by Deſcent, &c. any of the ſaid Lands.

And Papiſts not taking the Oaths, &c. 30 *Car.* 2. diſabled from inheriting, &c.

And the next of Kin, being a Proteſtant, ſhall inherit.

All

Leaſes to be made to Proteſtants only of the Lands ſo veſted in the Truſtees.

All Leaſes of any the Premiſſes, ſhall be made to Proteſtants, and none other; and if any Leaſe ſhall be made of any the Premiſſes unto, or in Truſt for any Papiſt, or ſhall be aſſigned to, or in Truſt for any Papiſt, every ſuch Leaſe, and Aſſignment, ſhall be void; and as well the Perſon making ſuch Leaſe or Aſſignment, as the Perſon for whoſe Benefit the ſame ſhall be made (in caſe ſuch Perſon ſhall accept ſuch Leaſe or Aſſignment, or ſhall occupy any the Tenements therein contained) ſhall forfeit treble the yearly Value of the Lands ſo let, aſſigned, or occupied, one Moiety to her Majeſty, and the other to ſuch Proteſtant who ſhall ſue for the ſame, in any of her Majeſty's Courts of Record, at *Dublin*.

Act not to make void Cottage Leaſes, &c.

Provided, that nothing in the laſt Clauſe, ſhall make void any Leaſe, of any Cottage, or Cabbin, under the yearly Value of thirty Shillings, to any Day-Labourer.*

By

* Note, in this Act of Parliament, it is proper to obſerve, that there is a material Diſtinction, as to *the Eſtates of the ſeveral Grantees of the* Iriſh *Forfeitures*, and *the other Eſtates not granted and veſted in the Truſtees*.

By the Statute, 2 *Ann.* ch. 6. *pars*, it is enacted, that every Papiſt, or Perſon profeſſing the Popiſh Religion, ſhall from the 24th of *March* 1703, be diſabled and rendered incapable to purchaſe, either in his own Name, or in the Name of any other to his Uſe, or in Truſt for him, any Manors, Lands, Tenements, or Hereditaments, or any Rents, or Profits out of the ſame, or any Leaſes or Terms thereof, other than any Term of Years not exceeding thirty-one Years, whereon a Rent, not leſs than two Thirds of the improved yearly Value at the Time of making ſuch Leaſe, ſhall be reſerved, and made payable during ſuch Term; and all Eſtates, Terms, or any other Intereſts or Profits whatſoever, other than ſuch Leaſes as aforeſaid purchaſed by, or for the Uſe of ſuch Papiſt, or upon any Truſt or Confidence, mediately or immediately, to, or for his Uſe, or Advantage, ſhall be utterly void.

Papiſt not to Purchaſe, but for 31 Years.

And by the Statute 8th *Ann.* ch. 3. *pars*, it is enacted, that all collateral and other Securities by Mortgages, Judgments, Statutes, Merchant or of the Staple, or otherwiſe, which have been, or hereafter ſhall be made, or entered into, to cover, ſupport or ſecure, and make good any Bargain, Sale, Confirmation, Releaſe, Feoffment, Leaſe, or other Conveyance, contrary to the 2d *Ann.* Seſſ. 1. ch. 6. are void to the Purchaſer of

All Purchaſes made contrary to the Act, 2d *Ann.* ch. 6. diſcoverable, as alſo Securities to make good the ſame.

of any of the ſaid Lands or Tenements in Truſt for, or for the benefit of any Papiſt, as likewiſe to any ſuch Papiſt, his Heirs, and Aſſigns reſpectively; and all ſuch Lands, *&c.* ſo conveyed or leaſed, or to be conveyed or leaſed to any Papiſt, or to the Uſe of, or in Truſt for any Papiſt, contrary to the ſaid Act; and all ſuch collateral Securities, as are, or ſhall be made, or entered into, to cover, ſupport, ſecure, or make good the ſame, may be ſued for by any Proteſtant, by his proper Action, real, perſonal or mixt, founded on this Act, in any of her Majeſty's Courts of Law, or Equity, if the nature of the Caſe ſhall require it; and the Plaintiff or Demandant in ſuch Suit, upon Proof, that ſuch Purchaſe or Leaſe was made in Truſt for any Papiſt, or under any Confidence to, or for any Papiſt, or for his Benefit by receiving the Rents, Iſſues, and Profits thereof, or otherwiſe, ſhall obtain a Verdict and Judgment, or Decree thereupon, and ſhall recover the ſame, and have Execution to be put into the ſeizin and poſſeſſion thereof, to hold and enjoy ſuch Lands, *&c.* according to the Eſtate, Uſe, Truſt, Intereſt or Confidence, which ſuch Papiſt had, or ſhould have had therein, had he been qualified to purchaſe or enjoy the ſame, ſubject to all ſuch Rents, Covenants, Conditions, and Reſervations, and all Incumbrances and Portions whatſoever, as the ſame would have been ſubject to in the Hands of

ſuch

ſuch Papiſt, or in the Hands of ſuch Perſon to whom the ſame were ſold, or leaſed in Truſt, for ſuch Papiſt, or to his Uſe or Benefit, and ſhall alſo have the full Benefit of all ſuch collateral Securities, as the Party to whom the ſame are, or ſhall be made, might have had.

Purchaſes by Papiſts before 1709, except of forfeited Eſtates, good on Conditions.

Provided, that every Papiſt that hath in his own Name, or in the Name of any other Perſon, or any in Truſt for him, purchaſed any Lands in Fee Simple, or any Leaſes for Years, or Lives, or other Eſtate, or Intereſt other than ſuch Lands, *&c.* as were once veſted in the late Truſtees for the Sale of the forfeited Eſtates in *Ireland*, in poſſeſſion, reverſion, or remainder, and which were afterwards diveſted out of them, and veſted in other Perſons by any private Act of Parliament in *England*, or *Great-Britain*, or who have lent any Money on Mortgages, or purchaſed in, any Mortgages in the Name of any Perſon in Truſt for him, other than Mortgages of ſuch Lands, *&c.* as were once veſted in the ſaid late Truſtees as aforeſaid, and hath or ſhall hereafter, on or before the 25th of *December* 1709, become a Proteſtant, and enroll a Certificate of the Biſhop of the Dioceſs in which he ſhall inhabit or reſide, in the *Chancery* in *Ireland*, teſtifying his being a Proteſtant, and conforming himſelf to the Church of *Ireland*, as by Law eſtabliſhed, and ſhall alſo receive the Sacrament according

ing

ing to the Uſage of the ſaid Church of *Ireland*, and make and ſubſcribe the Declaration, and ſhall alſo take and ſubſcribe the Oath of Abjuration, and ſhall alſo cauſe his Child or Children under the Age of fourteen Years, from the Time of ſuch his Converſion, to be educated in the Proteſtant Religion as by Law eſtabliſhed, the Purchaſe, Mortgage, Confirmation, Leaſe, and all other Covenants, and Agreements made to, or by ſuch Papiſt, or to or by any in Truſt for him, or to his Uſe (other than as before excepted) ſhall be as effectual, as if he had been a Proteſtant at the time of ſuch Purchaſe, Mortgage, *&c.* and not otherwiſe, to hold and enjoy ſuch Lands, *&c.* in ſuch, and for ſuch Eſtate, as he might have had if then a Proteſtant.

But Purchaſes by Proteſtants without Notice from Truſtee of Papiſt good.

Provided, that nothing herein, or in any former Act contained, ſhall extend to weaken any Eſtate, Right, Title, or Intereſt of any Proteſtant Purchaſer, for valuable Conſideration, *bona fide*, from any Perſon who had purchaſed in Truſt for any Papiſt, or from any Proteſtant deriving under ſuch Purchaſer, not having Notice of ſuch Truſt.

Such Truſts diſcoverable, and the Defendant ſhall anſwer, as to the Truſt, and not plead or demur.

Provided alſo, that any Proteſtant may prefer one or more Bill or Bills in the *Chancery*, or *Chancery* of the *Exchequer*, againſt any Perſon, concerned in ſuch Sale, Leaſe, Mortgage, or Incumbrance, and againſt all Perſons privy to ſuch Truſt

Truſt for Papiſts, and to compel ſuch Perſons to diſcover and detect ſuch Truſts, and anſwer all Matters relating thereunto, as by ſuch Bill ſhall be required, to which Bill, no Plea, or Demurrer ſhall be allowed; but the Defendant ſhall anſwer the ſame at large upon Oath, which Anſwer ſhall be good Evidence againſt the Defendant in Actions brought upon this Act: And that all Iſſues in any Suit founded on this Act, ſhall be tried by none but known Proteſtants.

The Affidavit to be annexed to Bills of Diſcovery on the Popery Act.

Theſe Bills of Diſcovery are founded on the above Statutes; and with ſuch a Bill an Affidavit muſt be filed, that the Plaintiff is a Proteſtant, and that he doth not file the Bill in Truſt for a Papiſt, or any Perſon profeſſing the *Popiſh* Religion; the Affidavit is uſually annexed to the Bill.

The like Affidavit to an amended Bill on theſe Acts.

And the like Affidavit muſt be made if the Plaintiff amends his Bill; ſo determined in the Caſe of *Marguſon* againſt *Bowerman* in this Court, in *Trinity* Term, 1749.

The firſt Bill filed takes place.

If ſeveral of theſe Bills be brought for Diſcovery of the ſame Matter, the Bill firſt filed takes Place; and therefore, although in all other Caſes, it is ſaid, that if a Bill be amended, it is deemed a Bill but from the Time of Amendment, it is otherwiſe as to theſe Bills, and A-

The Priority not prejudiced by Amendment.

mendment ſhall not affect the Priority of Suit: But when Attorney moves for Liberty to amend, he muſt at the ſame Time pray, that it may be without prejudice to Priority, and the Court will grant it, and it muſt be ſo inſerted in the Order.

Meſne Profits, but decreed from the time of filing the Bill.

The Plaintiff on theſe Bills on the Popery Acts, is decreed to the meſne Profits, from the Time of filing the Bill only, and not from the Time of the Purchaſe, unleſs upon very ſpecial Circumſtances.

The Plaintiff, if a Convert, muſt be a Proteſtant, according to the Rites and Ceremonies of the Church of *Ireland*, as by Law eſtabliſhed.

This Bill may be brought by a Perſon who had been a Papiſt, and has conformed to the Proteſtant Religion by the Law eſtabliſhed, and performed all the Requiſites in the Statutes, but not otherwiſe; and therefore it is ſaid, that ſuch Papiſt becoming a Preſbyterian, Quaker, or of any other Sect of Proteſtants, ſhall not be allowed to bring this Bill. And by the ſame Rule, it ſhould ſeem, he cannot purchaſe. But it has been held, that a Perſon who hath been from his Nativity any of theſe other Sects of Proteſtants, may bring this Bill, or may purchaſe.

But any Proteſtant who hath been ſo from his Nativity may bring this Bill.

Bill of Diſcovery on the Popery Acts for that Defendant, a Proteſtant, intermarried with a Papiſt, Defendant not obliged to anſwer as to his Marriage.

On a Bill of Diſcovery on the Acts againſt the further Growth of Popery, for that the Defendant, though a Proteſtant, having intermarried with a Papiſt, is by a Precedent, Stat. 9. *Will.* III. ch. 28. deemed a Papiſt to all Intents and Purpoſes,

poſes, and incapable of taking a Leaſe not warranted by the ſaid Acts; it was held that the Defendant was not obliged to anſwer as to his Marriage, and might plead or demur, as he ſhould be adviſed, notwithſtanding any of the Acts againſt the Growth of Popery; for that the Act 8 *Ann.* ch. 3. which ſays, the Defendant ſhall not plead or demur, intended not to take away the Benefit in any Caſe, but where a Truſt for a Papiſt may be covered. See the Caſe of *Brogdon* and *Murray*, in *Chanc. Hill.* 13 *Geo.* 1. alſo the Caſe *Reeves* againſt *Roderick*, in the *Exchequer*, *Hillary*, 3 *Geo.* 2.

On the Statutes againſt Proteſtants marrying Papiſts, there muſt be a Conviction, preceding the Forfeiture.

And it was alſo urged in the ſaid Caſe of *Brogdon* and *Murray*, and ſeemed to be the Opinion of the Court, that there muſt be a Conviction before there can be any Forfeiture on the ſaid Act 9 *Will.* 3. and that by the 2d *Ann.* ch. 6. which is an Explanation of this Act, a precedent Conviction is neceſſary; and ſo it was reſolved in the Caſe of *Babe* and *O'Neil*, and alſo in the Caſe of *Dobbins* and *Purcel*, in the Lord Chancellor *Weſt*'s Time.

Truſtee Lands ſet to a Papiſt, diſcoverable on the Popery Acts.

It is alſo held that any Intereſt acquired by a Papiſt, in any of the Lands which were veſted by the aforeſaid Statute, 11 and 12 *Will.* 3. ch. 2. *Eng.* contrary to the aforeſaid Statute, 1 *Ann.* ch. 32. *Eng.* is diſcoverable within the Words and Meaning of the ſecond Popery Act; and that ſuch a Conſtruction does not

controul, but rather execute and ſtrengthen the ſaid laſt mentioned *Engliſh* Act. See the Caſe of *Bunbury* and *Reilly*, *Hill.* 9 *Geo.* 2.

A reverſionary Term granted to a Papiſt, though but for a Day, is diſcoverable.

It is ſaid, that it has been determined, That a reverſionary Term, or Intereſt in *futuro*, though but for a Day, and though full two Thirds of the improved yearly Value be reſerved thereon, is diſcoverable by the Statute. *Gardiner* againſt *Plunket* in *Chancery*, *Hill.* 1 *Geo.* 2. and *Sheldon* againſt *Kearney* in the *Exchequer*, *Trin.* 2 *Geo.* 2. And in this laſt Caſe, the Chief-Baron ſaid, that were it to be otherwiſe, there would be a Time that the Papiſt Leſſee paid nothing; and yet it ſeems hard that the Landlord and Tenant, cannot treat or agree until the very Day the Leaſe is expired.

Papiſts may deviſe deſcendible Freeholds.

It is ſaid a Papiſt may deviſe a deſcendible Freehold, notwithſtanding the Acts againſt the Growth of Popery.

May take Renewals of Leaſes for Lives made before the Acts.

It is alſo ſaid that if a Papiſt had a Leaſe for Lives before the Statute, with Covenant of Renewal, that after the Act he may have a Renewal, and it is not diſcoverable; for the Covenant was Part of the Acquiſition and Purchaſe, which was precedent to the Statute. See the Caſe of *Broder* and *Martin* in the *Exchequer*, and *Martin* and *Lynch* in the ſame Court, *Eaſter* 1739.

It

It was held in the Caſe of *Leamore* and *Bourke*, in *Chancery*, That a Proteſtant who marries a Papiſt is incapable of being a Proteſtant Diſcoverer; and yet in the aforeſaid Caſe of *Reeves* and *Roderick*, the Court ſeemed to be of Opinion, that ſuch a Perſon is not a Papiſt within the Meaning of the Popery Acts: And it is alſo ſaid he may purchaſe; but theſe Matters are by no Means ſettled. On the one Hand, it is ſaid, that though a Man who marries a Papiſt, ſhall be deemed a Papiſt, and ſhall incur the ſeveral Penalties in the Statute 9 *Will.* 3. yet in Reality he is not a Papiſt, and ſhall not incur any further Penalties than thoſe mentioned in the ſaid Act, and that the after Popery Acts extend only to actual Papiſts, and not to conſtructive Papiſts, on the ſaid Statute, 9 *Will.* 3. That were it to be otherwiſe, he would be a Proteſtant to ſome Intents within the Meaning of the Popery Acts, and a Papiſt to other Purpoſes. On the other Hand, it is ſaid, that this Proteſtant who marries a Popiſh Wife, is a more odious Papiſt than a real and actual Papiſt, in Profeſſion and Principle; and the Acts againſt the Growth of Popery, expreſſing *every Papiſt, or Perſon profeſſing the Popiſh Religion*, &c. takes in conſtructive as well as actual Papiſts; and the firſt of theſe Acts recites the ſaid Act, 9 *Will.* 3. Upon the whole,

If a Proteſtant, who marries a Papiſt, can be a Diſcoverer, or purchaſe.

the better Opinions are, that ſuch a Papiſt can neither purchaſe, or be a Diſcoverer.

Papiſts may take Conveyances in Truſt for Proteſtants.

It is alſo ſaid, that a Papiſt is capable of taking a Conveyance in Truſt for a Proteſtant.

The Certificate of Conformity muſt be by the Biſhop himſelf.

It was alſo ſaid, that the Certificate of Conformity required by the Act, muſt be by the Biſhop himſelf, his Commiſſion is not ſufficient, though he be abſent *ex Rebus*.

If the Plaintiff dies before a Decree is obtained, the Suit is determined, and no Intereſt veſts in his Repreſentative.

If the Plaintiff dies before he hath obtained a Decree, the Suit is abſolutely determined, and no Right ſurvives either to the Heir, Executor, or Adminiſtrator of the Diſcoverer, for it is a popular Action, and dies with the Perſon; ſo determined by the Houſe of Lords, in the Year 1738, on an Appeal from a Decree of the Court of *Exchequer* in the Cauſe of *Green* againſt *Ryland*, *Fitzgerald*, *Roch*, and others, in *Trinity*, 1734. Beſides the firſt Diſcoverer can only be conſidered as a common Informer, and by the aforementioned Statutes, he has only a bare Right of Action given him, and where, by any penal Statute, a Forfeiture is annexed to that which was no Offence before, and the Right of ſuing for it, is given to any Informer, no tranſmiſſable Intereſt, Eſtate, or Title, can veſt in him

him before Judgment firſt obtained for the Recovery thereof; ſo that if any other Bill has been filed by a ſecond Diſcoverer, before the Death of the firſt, or immediately after his Death; and before a new original Bill is filed by the Repreſentative of the firſt Diſcoverer, in either Caſe, it will take Place.

But where a Decree has been obtained on ſuch a Bill, there is an Intereſt veſted, and if the Plaintiff dies, his Repreſentative may carry it into Execution.

No Proceedings within a Year and a Day if the Suit is determined, and if a ſubſequent Diſcoverer ſhall have the Benefit.

It is alſo ſaid, that if the Plaintiff lies by, and there have not been any Proceedings within a Year and a Day, that the Suit is determined, and a ſecond Diſcoverer ſhall have the Benefit of the Diſcovery. On the other Hand it is ſaid, the Decree on the ſecond Diſcoverer's Bills, ſhall be deemed a Truſt for the firſt Diſcoverer, unleſs ſome Colluſion appears to evade the Acts, or that the Laches are ſo great, as to amount to a Dereliction. *Sed quær.*

Lands purchaſed for a Papiſt, no Conveyance to him, on becoming a Proteſtant, will avoid a Diſcovery.

If Lands be purchaſed in Trnſt for a Papiſt, no Conveyance to him on his becoming a Proteſtant, can avoid a Diſcovery againſt him under the ſaid Acts againſt the Growth of Popery.

Landlord in the general need not be a Defendant to a Bill of Diſcovery.

It ſeems now to be ſettled, that in the general, on a Bill of Diſcovery on the Popery Acts, for a Leaſe, the Landlord need not be made a Party.

Exception.

But in the Caſe of *Raffen* againſt *Hackett*, in *Chancery*, *Trin.* 1732, *A.* made a Leaſe to *B.* a Papiſt, contrary to the Popery Acts, being a Leaſe in Reverſion, and to commence at a future Day: *B.* after the Commencement of the Leaſe, ſurrenders the reverſionary Leaſe, and took a new Leaſe for the Term unexpired of the former Leaſe, and under more Rent; *C.* filed a Bill for the new Leaſe, *D.* for the reverſionary Leaſe, which was ſurrendered: It was determined that the Landlord muſt be a Party becauſe of the Surrender.

Though the Diſcoverer has the Leaſe in his Poſſeſſion, he may file a Bill.

A. makes a Leaſe to *B.* a Papiſt, to commence ſeveral Years after, *D.* gets the Leaſe into his Poſſeſſion, and before the Commencement of this Leaſe, files a Bill of Diſcovery on the Popery Acts: Objected that his Remedy is at Law, for that he has the Leaſe, and *B.* has not been in Poſſeſſion: Anſwered he could not ſue at Law until *B.* was intitled to the Poſſeſſion under the Leaſe, and thereby any Perſon, in the mean Time, may, by Bill of Diſcovery, prevent him of the Benefit of the Act: And of that Opinion

Opinion was Lord Chancellor; *Mercer* againſt *French* and *Bourke*, in *Chancery*, *Trin.* Term, 1732.

In diſcovery Bills, the Repreſentative of the *Ceſtuique Truſt*, need not be a Party.

A. files his Bill on the Popery Acts againſt *B.* *B.* his croſs Bill: *A.* ſays in his Anſwer, that his Bill was in Truſt for *C.* *C.* dies, not neceſſary to have his Repreſentative before the Court: So held in the original Cauſe, 1738, in the *Exchequer*, *Foot* againſt *Nagle*.

A Proteſtant Truſtee for a Papiſt, a good Diſcoverer againſt the ſame Eſtate.

A Proteſtant who declared a Truſt for a Papiſt, was admitted to be a good Diſcoverer againſt the ſame Eſtate, as it was an illegal Truſt, and remained by the ſecond Popery Act, 8 *Anne*, ch. 3. only for the Benefit of any Proteſtant Diſcoverer; *Cue* againſt *Woodly*, *Paſch.* 1745, in the *Exchequer*.

The Court will not compel the Defendant tho' poor, to give Security to pay Coſts.

Motion was made to oblige a Proteſtant Diſcoverer to give Security to pay the Coſts of the Suit if he did not ſucceed, it having appeared by the Anſwer to the croſs Bill, that he was a labouring Man of no Subſtance, and that the Bill was filed in his Name, in Truſt for a Minor who was out of the Kingdom; but the Motion was denied. *Simpſon* and *French* in the *Exchequer*, *Trin.* 1747.

Note, upon the Motion, this Caſe was mentioned by the Chief-Baron; a Papiſt

Papiſt Tenant held a Farm too dear, in order to get rid of it, he ſets up a Diſcoverer on the Popery Acts, the Leſſor thought it hard that ſuch an Artifice ſhould oblige him to accept of his Land, or an inſolvent Tenant, and diſcloſed that to the Court, but the Court would give him no Relief.

Diſcoverer's Title to appear on his Bill, or Defendant may demur.

If Title does not appear in the Plaintiff on the Face of his Bill, as if he ſhould not ſet forth that he is a Proteſtant, the Defendant may demur.

A Convert from Popery, muſt perform all the Requiſites in the Acts, to enable him to purchaſe.

In the Caſe of *Tomlinſon* againſt *Farrel*, on a Bill of Diſcovery on the Popery Acts, in the Court of *Chancery*, *Michaelmas* Term 1759, it was determined that *Farrel*, as a Convert from Popery, was not a Proteſtant qualified to purchaſe, although he had ſtrictly performed all the Requiſites, except having taken the Oaths, *&c.* in the Time preſcribed by the Act, in which, he was late but a few Days, and there was a Decree for *Tomlinſon* the Proteſtant Diſcoverer.

Arguments for the Defendant.

On this Caſe it was urged for the Defendant, that by the Popery Acts, a particular Mode or Evidence of a Conformity, was required only in Caſes where new Rights are given by thoſe Laws that did not exiſt before; for Inſtance, the Privilege given to an eldeſt Son of a Popiſh

Popiſh Father on the Son's Conformity to make the Father Tenant for Life, the Privilege given to every convert Child to compel the Father to give it a Maintenance; and the Privilege of acquiring Property as Proteſtant Informers: And in Caſes where particular old Rights are modelled and given to Proteſtants of the eſtabliſhed Church, by that Deſcription ſuch as the Right to ſucceed to a Proteſtant in a landed Eſtate; the Right of the eldeſt Son of a Popiſh Father, by the Son's Conformity to take the Father's Eſtate of Inheritance, after his Death, which otherwiſe muſt have gone to all the Sons equally.*

But that in all Caſes where Penalties and Diſabilities are inflicted on Papiſts, or Perſons profeſſing the Popiſh Religion by that Deſcription, the Queſtion has never been, whether ſuch Perſons have been Proteſtants of the eſtabliſhed Church, but whether they have been of the Popiſh Religion. Ibidem.

On

* In ſome of theſe Caſes the Notoriety of the Act is moſt abſolutely neceſſary as a Caution and Notice to Purchaſers, to prevent Perſons from dealing with the Father where he is made Tenant for Life, or with the other Coparceners or younger Sons, where the eldeſt conforms: See the Caſe of *Graham* againſt *Fagan* in the *Exchequer*, *Trin.* 2 *Geo.* 2. the Decree affirmed by the Lords. Note, the Names of ſuch Converts whoſe Certificates are filed, are publiſhed in the Rolls Office.

Arguments for the Plaintiff.

On the other Hand, it was urged that theſe Laws are remedial and conſtitutional Laws, and extend to every Caſe where the Intereſt of a Convert from Popery may be concerned; and that therefore a Convert from Popery not filing a Certificate, within the Time preſcribed by the Act, ought to be looked upon as a Papiſt, or Perſon profeſſing the Popiſh Religion, however remote ſuch Perſon may be in Principle and Practice from that Perſuaſion.

This Decree is now before the Houſe of Lords of *Great-Britain*, on an Appeal.

Amended Bill.

Of amending the Libel at the Civil Law, and the Analogy thereto in the preſent Method of amending.

BY the Civil and Canon Laws, the Libel cannot be amended, *poſt Litis Conteſtationem*; this Rule was exceedingly ſtrong in the old Civil Law; for the *Litis Conteſtatio* being before the *Prætor*, the Judge had only Commiſſion to hear that Cauſe, and he could not alter or change it; and therefore, they did not take the *judicium* to be *cæptum*, until the *Litis Conteſtatio*; but after the *Litis Conteſtatio*, they were ſuppoſed to be under a *quaſi contractus*, to ſubmit to the Sentence,

Sentence, becauſe they received the Judges by Agreement of both Parties from the *Prætor*; and though there was the ſame Judge both for the *Litis Conteſtatio*, and the Sentence in the Canon Law, yet they allowed the Time for forming the Libel to be *ante Litem Conteſtatam*, and that *poſt litem conteſtatam*, it comes too late, for that would be to make another Cauſe, which is not in Conteſt. *Gail*, 134. *Maranta*, 272. *Vallences*, 127.

Bill in Equity may be amended at any Time before Iſſue joined, but not afterwards by inſerting new Matter.

It is ſo with us in Courts of Equity; for a Plaintiff may at any Time amend his Bill before Iſſue is joined, that being the Time for him to form his Complaint, and therefore he cannot have a ſupplemental Bill before Iſſue joined, becauſe the firſt Cauſe was in but *Fieri*; but after Iſſue joined, he cannot amend his Bill by inſerting any new Matter, or by altering the Drift of his Bill, or the Nature of his Caſe, becauſe the firſt Cauſe was cloſed; but he may file a ſupplemental Bill with Leave of the Court, and this amended Bill is eſteemed but a Continuation of the original Bill, and theſe two are accounted but as one.

RULE, 15. Ibidem.

By the 15th general Rule, the Plaintiff ſhall be at Liberty to amend his Bill at any Time before a Copy be given out, by taking out an Order of courſe.

And

But the Court will give Plaintiff Leave to amend, by adding of Parties only, though Iſſue be joined.

And the Court will give the Plaintiff Leave to amend his Bill, even after Iſſue joined, by adding of Parties only; upon the common Motion of an Attorney, and often upon the Hearing, the Court adjourn the Cauſe, and give the Plaintiff Leave to amend his Bill by adding Parties.

But not to add new Matter.

But in the Caſe of *Cahill* againſt Sir *Thomas Taylor*, in this Court, after Iſſue joined, the Plaintiff moved to amend his Bill, by inſerting a Denomination in a Leaſe omitted in the Bill, and it was refuſed.

Sed Quær.

And yet in the Caſe of *Braddell* againſt *Gaven* in this Court, *Eaſter* Term, 1750, the Plaintiff after Rejoinder filed, got Leave on Counſel's Motion, without Notice, to withdraw his Replication, and amend his Bill by adding new Matter, paying the Coſt of the Rejoinder; ſo that this Point ſeems not to be as yet ſettled in this Court, although it is abſolutely ſettled, that a ſupplemental Bill ſhall not be brought before Iſſue joined; but I ſhould think it a Matter quite indifferent to the Defendant, whether ſuch new Matter be introduced after Iſſue joined by an amended, or a ſupplemental Bill, the former is more for his Advantage, as the Coſt of his Anſwer, and the Rejoinder (if filed) is to be paid, before the

the Plaintiff can compel him to anſwer, which is not the Caſe on a ſupplemental Bill.

Bill to be amended in a Week after Order.

This Bill will not be anſwered, unleſs there be an Order for amending the original Bill, which the Court will grant of courſe, upon Motion of the Plaintiff's Attorney; and the Bill is to be amended in a Week after ſuch Order is obtained, or it is deemed diſcharged of courſe, and the Plaintiff muſt renew the Order.

On amended Bills, the Defendant is not to be ſerved with Proceſs, except in ſome particular Caſes.

Upon the amended Bill no new Proceſs is generally to be ſerved; but if a Defendant to the original Bill hath changed the State, or Condition he was in, at the Time the original Bill was filed, or hath become a different, or another Perſon, and thereby hath acquired a new Right, or a new Obligation, or in caſe any Right be denied to him by the amended Bill, which, by the original Bill he was allowed to have: As for Inſtance, if a Defendant after the original Bill was filed, ſhould become an Executor, or Adminiſtrator to another Defendant in the Cauſe, or that he ſhould take upon him either of theſe Offices, with Reſpect to the Matter in Controverſy, or in Caſe a Defendant was a Peereſs by Marriage, at the Time the original Bill was filed, but had afterwards married with a Commoner, by which

which ſhe loſt her Privilege, and that theſe Matters are charged by the amended Bill; in ſuch Caſes it may be neceſſary, or at leaſt prudent, to pray new Proceſs in the amended Bill againſt ſuch Defendant, and to ſerve the ſame; for, as one and the ſame Man may be in ſeveral *States* together, provided they do not claſh with each other, ſo he may ſuſtain ſeveral *Perſons* together, upon Suppoſition, that the Duties attending theſe *Perſons* may be performed together by him, yet with Reſpect to each of theſe States, be conſidered as a diſtinct Perſon. See Mr. *Hirtius*'s Treatiſe *de uno homine plures ſuſtinente Perſonas*; and ſee 1 *Vern.* 284. *quando duo jura in uno conveniunt, æquum eſt ac ſi eſſent in diverſis.* See *Puffendorf* on *Moral Entities*, in his *Law of Nature and Nations.* B. 1. Ch. 1. S. 14.

Coſts when to be paid, and when not, on amending Bills.

As to amending Bills, if the Anſwer be not filed, nor a Copy of the Bill taken out, the Plaintiff ſhall amend without Coſts; but if the Copy is taken out, then the Plaintiff ſhall give the Defendant an amended Copy atteſted; and if the Anſwer be filed, the Plaintiff muſt pay the Defendant twenty Shillings Coſts; and if the Plaintiff requires a further Anſwer, his Attorney muſt move the Court, that the Defendant may anſwer the amended Bill; and thereupon, the Court will make an Order, that he ſhall anſwer the amended Bill in four Days; and if the Defendant

doth not anſwer the Bill in four Days after Service of the Order, or pray further Time to anſwer, an Attachment may iſſue againſt him on the fifth Day without further Motion.

Though the Plaintiff ſhould not require a further Anſwer, yet the Defendant is at Liberty to anſwer the Amendment, if he ſees fit; and if the Plaintiff proceeds after the Amendment, without ſerving the Defendant with an Order to anſwer the Amendment, if he thinks proper, or abide by his former Anſwer, his Proceedings will be irregular; but if the Amendment be only in Matter of Form, or by adding of Parties, ſo that the Plaintiff does not require a further Anſwer, he is not to pay any Coſt to the Defendant; but regularly he ſhould give him Notice, in writing, that he does not require his Anſwer. So determined in the Caſe of *Bothwell* againſt *Williams*, in this Court, *Trin.* 1722.

Defendant may anſwer the Amendment, and a Rule to be put on him by the Plaintiff.

But in all Caſes, where a Plaintiff amends his Bill, by inſerting new Matter, though he doth not require the Anſwer of a Defendant who has before anſwered, yet he muſt ſerve him with an atteſted Copy of the amended Bill, and with an Order to anſwer the Amendment in the uſual Time, or abide by his former Anſwer as aforeſaid; and

A Rule to be put on the Defendant to anſwer the amended Bill; and in what Caſes Defendant is to be ſerved with a Copy of the amended Bill, and to be paid Coſts.

must pay twenty Shillings Coſts to the Defendant; and until the Coſts be paid, the Plaintiff cannot proceed upon the amended Bill.

Amendment, by adding of Parties, when to be without Coſts.

Amendment, by adding of Parties, is to be without Coſts, provided that the other Defendants are not thereby put to Coſts; and it ſhould be expreſſed in the Order, that the Amendment is only by adding a Party, that it may appear in what Reſpect the Amendment is.

And the Proceedings thereon.

If the Amendment be only by adding of Parties, or, in ſome ſmall Matter, the Plaintiff is not obliged to ſerve the Defendant with an atteſted Copy of the amended Bill, but muſt amend the Defendant's Copy; but if the Defendant ſhall refuſe to let the Plaintiff amend his Copy, the Plaintiff's Attorney may, on Motion, obtain an Order that the Defendant's Attorney ſhall, within two Days, or four Days, (as the Court ſhall think proper) bring in his Copy, to the Plaintiff's Attorney, to be by him amended; which if he neglects to do, in the Time preſcribed by the Order, after Service thereof, the Plaintiff's Attorney ſhall be at Liberty to proceed without further Motion; but in this Caſe, the beſt Way is to ſerve the Defendant with an atteſted Copy of the Amendment.

It

RULE. *Hillary Term*, 1743.

It was uſual, when a Rule for amending a Bill was conceived, to take it off the File, and often alter the Caſe, and, if too much was admitted by the Bill, to ſtrike it out, and often the Record was not returned again: But this Method was afterwards altered, and by a late Rule made in *Hillary Term*, 1748; if the Amendment be within a narrow Compaſs, as by adding a Party, or Words omitted by Miſtake, the original Bill may be amended upon the File; but if the Amendment be conſiderable, or if any Part is to be ſtruck out (for by the Rule no Bill is to be erazed) then a new Bill is to be framed, and to be ſigned by Counſel and Attorney, and affixed to the original Bill; and this is properly what may be called an amended Bill.

Bill to be amended on the File.

New Ingroſſment in what Caſes.

If the Amendment of a Bill is by fixing a new Ingroſſment to the firſt Bill, tho' the Amendment relates but to ſome of the Parties, yet all the Defendants, who are Parties to the firſt Bill, muſt be alſo Parties to the Amendment, or the Officer will ſtrike out of the Bill-Book all the Defendants which are omitted in the Amendment, and they will be deemed no longer Parties to the Suit.

All the Parties to the firſt Bill to be Parties to the Amendment.

And a Bill amended ſhall be deemed a Bill but from the Time of Amendment, which may be inconvenient in

Bill amended, only a Bill from thence, except in Caſes of Bills of Diſcovery.

the Caſe of a Proteſtant Diſcoverer, where Priority of Suits take Place; but when a Bill is brought for Diſcovery on the Popery Acts, if the Plaintiff would amend it, his Attorney, at the Time he moves for Liberty to amend, muſt at the ſame Time pray that it may be without Prejudice to Priority, and the Court will grant it, and it muſt be ſo inſerted in the Order to amend.

Amended Bill if it ſhall affect an Injunction.

It has been ſaid, that if an Injunction be obtained on a Bill which is afterwards amended, that the Injunction is gone by the Amendments: But in *Pract. Reg.* 210, it is ſaid, that amending never moves or touches the Injunction. *P. Cur.* in the Caſe of *Hartwell* againſt *White*, in this Court, there being a Rule to amend the Bill, the Defendant, who had been ſerved with an Injunction, iſſued an Execution, and ſeized the Goods of the Plaintiff in Equity, and on Complaint, the Court contradicted the former Notion, and declared, that a Rule for amending the Bill, did not move or touch the Injunction, and accordingly ordered an Attachment: But the ſafe Way is for the Plaintiff to move to amend without Prejudice to the Injunction.

On a Report of an inſufficient Anſwer, or on allowing Exceptions, Plaintiff may amend his Bill without Coſts.

If Exceptions be taken to an Anſwer, and the Anſwer is reported ſhort, if the Plaintiff would amend his Bill, his Attorney muſt move for Liberty to amend, which

which the Court will grant, and when the Bill is amended, he may, on Motion, obtain an Order that the Plaintiff may Anſwer the Exceptions and Amendment at the ſame Time; and the Court will make an Order, that he ſhall anſwer the ſame in four Days after Service of the Order; and if the Plaintiff obtains this Order before the Defendant hath anſwered the Exceptions, he ſhall pay no Coſts for the Amendment, tho' the Defendant ſhall pay the Coſts of the Exceptions; and the Proceedings are the ſame where the Defendant allows the Exceptions, and ſubmits to Anſwer; for an inſufficient Anſwer is as no Anſwer. And in either Caſe, the Plaintiff muſt ſerve the Defendant with an atteſted Copy of the amended Bill. 1 *Har. Ch. Pract.* 44. 3d. Edit.

Defendant, without waiting for the Amendment, puts in a ſecond Anſwer.

In the Caſe of *Coulſton* againſt *Richardſon*, *Bunb. Rep.* 168, upon arguing Exceptions, they were allowed, whereupon the Plaintiff obtained an Order to amend his Bill without Coſts, he amending the Defendant's Copy; the Defendant, without waiting for the Amendment, put in a further Anſwer, and then moved to diſſolve the Injunction, upon the coming in of his ſecond Anſwer. But it was moved for the Plaintiff, that this Anſwer came irregularly, before he had amended his Bill; and it appeared (although Delay

on the Plaintiff's Side was ſuggeſted) that the Plaintiff offered to amend his (the Defendant's) Copy: And the Court thought the moſt proper Method, in this Caſe was, for the Plaintiff to take Exceptions to the ſecond Anſwer, and to turn the whole Amendments into Exceptions, and the Order for ſhewing Cauſe why the Injunction ſhould not be diſſolved was enlarged.

Bill amended where Proceſs of Contempt are entered.

Where Proceſs of Contempt are entered againſt the Defendant for not anſwering, and that the Plaintiff would amend his Bill, he is to move to amend it without Prejudice to the Proceſs or Proceedings. *

Bill not to be amended in a Part wherein it was diſmiſſed upon the Merits.

A Bill being brought, on behalf of an Infant, was diſmiſſed, in Part, upon the Merits; after the Infant came of Age, he petitioned the Court that he might have Leave to amend his Bill, or be allowed to bring a new or ſupplemental Bill, as he ſhould be adviſed; but the Court

* This is not ſo in the Court of *Chancery*: And really there ſeems ſome ſort of inconſiſtency in this Practice in this Court, for here, (as in the Court of *Chancery*) if a Bill be amended, it is but deemed a Bill from the Time of Amendment; why then ſhould the Proceſs remain or be continued, when that, on which it was founded, no longer exiſts? And is not the thus continuing Proceſs, on an amended Bill, puniſhing a Perſon for not anſwering that which was not in being at the Time the Puniſhment commenced.

Court declared, there did not appear to be any Precedent of an Amendment to a Bill in a Part, wherein it had been diſmiſſed upon the Merits. 2 *Williams*, 402. *Moſeley's Rep.* 68.

If a Demurrer is brought for a Slip or Miſtake in the Bill, and that the Plaintiff allows the ſame in the four Days, and pays twenty Shillings Coſts, the Plaintiff's Attorney may then, upon Motion of courſe, obtain an Order for Liberty to amend his Bill. 2 *Williams*, 300.

Demurrer for a Slip or Miſtake in the Bill, if the Plaintiff allows the Demurrer and pays Coſt, he may amend his Bill.

In the Caſe of *Davis* againſt *Fleming* and others, and the contrary, in this Court, *Hillary* Term, 1754, two Bills being referred to a Baron, and reported to contain one and the ſame Matter, and the Report confirmed; the Attorney for the Plaintiff, in the ſaid two Bills, intending to amend the ſecond Bill, moved for the uſual Order to amend in general, and accordingly amended the ſecond Bill: But it was inſiſted upon, by Mr. *Anthony Malone*, Counſel for the Defendants, to the ſecond Bill, and ſo admitted by the Court, That this general Order could only relate to the firſt Bill; for, that upon confirming the Baron's Report, the ſecond Bill was as much out of the Queſtion, as if it had been pleaded to, and the Plea allowed, which was the antient Method, and in lieu of which this Practice of referring the two Bills to

Two Bills reported to be for one and the ſame Matter, a general Order to amend will relate only to the firſt, and not to the ſecond Bill.

a Baron, was ſubſtituted for the Eaſe of the Suitors.

Inſtructions for amending Bills.

The amending of Bills is unqueſtionably often indiſpenſibly neceſſary, but the Method of doing it is almoſt as often a great Grievance; for, in the general, the whole of the original Bill, is again ingroſſed, together with the new Matter. This uſually produces a ſecond Anſwer to all that is contained in the original Bill, as well as to the new Matter, and eſpecially if the Order or Style of the original Bill be tranſpoſed or altered; makes Briefs whole Volumes and Heaps of Confuſion: For there is not one Attorney or Agent in twenty, who has Skill enough, or if he has Skill, has Time to ſeparate ſuch Parts, which are only proper and neceſſary to be inſerted or retained, of theſe voluminous Pleadings, from what is ſuperfluous and cumberſome; whereas, in the general, in amending Bills, there is no Neceſſity for more than this; "To "charge that the Plaintiff (naming "him) at ſuch a Time filed his Bill "againſt the Defendant or Defendants "(naming him or them) charging as "therein is charged, and for the Pur"poſes therein mentioned, and refer"ring thereto, and then introduce the "new Matter, and praying that the "preſent Bill, and the original Bill, "may be taken as one and the ſame "Bill," which will not prevent the Plaintiff from further interrogating the Defendant

Defendant to any of the Matters in the original Bill, in which he might have been deficient, and will anſwer all the Purpoſes of again inſerting the whole of the original Bill. I have ſometimes ſeen two, three, and four of theſe long amended Bills, and long Anſwers thereto, at full length in one Brief.

Of the ſupplemental Bill.

Of the ſupplemental Bill at the Civil Law.

ACCORDING to the Civil Law, the Plaintiff by leave of the Court, might add any new Poſitions before Replication; for the Replication was the Conteſtation of the Anſwer; and therefore, after the Anſwer was conteſted, there could be no Poſitions, but they went on to their Proof: But if any new Matter was diſcovered after Replication, they might, by leave of the Court, file a ſupplemental Bill, touching any Matter of Fact that was diſcovered after ſuch Replication; for the ſupplemental Bill was in nature of a new Cauſe, which might be brought by Leave of the Court after the *Conteſtatio Litis* in the former Cauſe, and the Court may lengthen the Time for Publication, after ſuch ſupplemental Bill, and Anſwer are come in; becauſe the Prolongation of the probatory Term was very much in the breaſt of the Court; but if the ſupplemental Bill be moved for after Publication, the Court

Court never gives them Leave to examine any Thing that was in Iſſue in the former Cauſe, for the manifeſt Danger of Subornation, where they have Sight of the Depoſitions of the Witneſſes. *Vallences*, 127. *Gail*, 134. *Maranta*, 272.

Supplemental Bill, in Courts of Equity, in what Caſes.

So, in Courts of Equity, when new Matter is diſcovered by the Plaintiff after Replication is filed, and the Cauſe is at Iſſue, which Matter is neceſſary for the Plaintiff to ſet forth to the Court in aid of the Matter of Equity ſet forth in his Original Bill, he may introduce it by a ſupplemental Bill, but cannot regularly do it by way of Amendment; for, as it has been ſaid before, the Plaintiff's Time for framing his Cauſe, is before Iſſue is joined, as the Cauſe is then but in *Fieri*, as the Civilians term it, but after Iſſue is joined, the Cauſe is cloſed; and therefore, if afterwards, the Plaintiff would introduce any new Matter, ſo as to make it a Part of the ſame Cauſe, he muſt do it by a ſupplemental Bill, but not without Leave of the Court.

Affidavit of the new Matter to be made by the Plaintiff, and Notice of the Motion to be given.

And this Motion is to be made by Counſel, on an Affidavit to be made by the Plaintiff himſelf, in which he is to ſet forth the new Matter, and at what Time it came to his Knowledge.

RULE. Not to be Filed before Iſſue joined.

By a Rule made the 8th of *July*, 1715, by Lord Chief Baron *Gilbert*, no ſupplemental Bill is to be filed before Iſſue is joined,

joined, without Leave of the Court, and upon ſpecial Reaſons; but that any Alteration of the Bill, before the Cauſe is at iſſue, muſt be done by way of Amendment.

What to contain.

And this Bill is to be a diſtinct Bill, reciting briefly the Proceedings; and then the new Matter and Proceſs for Appearance is to iſſue on this Bill, as on the original Bill.

Supplemental Bill, after Publication.

And it may be brought after Publication, or even after Hearing in the Cauſe, upon Affidavit and Motion as aforeſaid.

May be brought either before or after Hearing.

And where this Bill is brought after Hearing, it recites the former Proceedings, and the true State of the Cauſe, and then, by way of Supplement, adds the new Matter, and then prays Proceſs, as in an original Bill.

After Publication, no Examination to any Matter in iſſue, and not proved in the original Cauſe.

Where a ſupplemental Bill is brought after Publication, it is irregular to examine Witneſſes to a Matter that was in Iſſue, and not proved in the original Cauſe, and ſuch Proof is not to be read. *Bagnel*, 1725. 1 *Har. Cha. Pract.* 273. 3d Edit.

May be added in a Bill of Review.

In a Bill of Review, a new ſupplemental Bill may be added, *Hill.* 1682, between *Price* and *Keyle*, 1 *Vern.* 135.

For

There may be ſupplemental Bill after Publication for Matter of Account.

For Matters of Account, there may be a ſupplemental Bill after Publication; becauſe the Parties examine to ſuch Matters of Account before the Officer or his Deputy after Publication; and this is from the neceſſity of the Thing; becauſe the Charge and Diſcharge muſt be made up privately, before the Officer, and therefore the particulars thereof muſt be proved, ſuch Accounts being now kept by Books or Notes, and formerly by Scores or Tallies, one againſt another; and therefore a ſupplemental Bill in Matter of Account is ſeldom refuſed. So likewiſe a ſupplemental Bill may be for any Matter diſcovered after Publication paſſed, that was not in Iſſue in the ſame Cauſe; and where ſuch Fact might vary the Decree, but after the Decree pronounced and enrolled, it muſt be by Bill of Review and Reverſal. See 2 *Chan. Rep.* 142.

May be exhibited for diſcovery of more Evidence.

The Plaintiff brought a ſupplemental Bill for Diſcovery of more Evidence touching a Matter of Account, to which the Defendant pleaded the former Bill, and that the Cauſe was heard and an Account directed; but he was ordered to anſwer to all Matters in this Bill, not anſwered unto in the former caſe, but the Plaintiff not to Reply, or proceed any further without Order; 30 *Cha.* 2.

between

between *Bowe* and *Shipwith*, 2 *Chan. Rep.* 142.

If there be no Proof of the new Matter in the ſupplemental Bill, it muſt be diſmiſſed, if ſuch Matter is not fully admitted in the Defendant's Anſwer. 1 *Har. Ch. Pract.* 273. 3d. Edit.

If the new Matter be not admitted or proved, the Bill to be diſmiſſed.

In the Caſe of *Proby* and *Proby* in this Court in *Trinity Term* 1749, a Miſtake was committed in the Bill in a moſt material Point in the Plaintiff's Caſe, which was not diſcovered until after the Cauſe came on to be heard, and was ordered to ſtand over for want of Parties; the Plaintiff made Affidavit of this Matter, and moved to amend his Bill, or for Liberty to file a ſupplemental Bill; but it was inſiſted by Counſel for the Defendant, that there was no inſtance where a Bill was amended after Iſſue joined, by altering the Giſt or Nature of the Caſe; and as the Matter omitted or miſtaken was intirely within the Knowledge of the Party at the Time of filing the Bill, it was not within the Rule for ſupplemental Bills. And that to entitle a Perſon to a ſupplemental Bill, it muſt appear by Affidavit, either that Matter happening prior to the filing of the Bill, hath ſince come to the Plaintiff's Knowledge, and not before; or that new Matter hath come to his Knowledge which happened

It muſt appear that the new Matter was not within the Plaintiff's Knowledge at the Time of filing his Bill, or the Court will not give Leave to file a ſupplemental Bill.

happened ſince the filing of the Bill relative to his Relief. On the other Hand, the Counſel for the Plaintiff inſiſted, that a ſupplemental Bill was very proper in Equity to rectify Errors, as where a Miſtake had been committed in ſetting forth a Deed, or Pedigree, but the Court would make no Rule.

Formerly the new Matter was introduced by a ſpecial Replication, but this Practice now but ſeldom uſed.

Formerly they had a Manner in *Chancery* of filing a ſpecial Replication, which is ſetting out of farther Facts in ſupport of the Bill; and this created ſpecial Rejoinders, Surrejoinders, Rebutters and Surrebutters: But this was found to create great Perplexities and Diſputes, how far the ſubſequent Pleadings were in ſupport of the Bill and Anſwer; and therefore they came back to the old and ſolid Method of the Civil Law, by adding new Poſitions after Iſſue was cloſed, and by ſupplemental Bills and by making a new Cauſe aftarwards; ſo that ſpecial Replications are now but ſeldom uſed generally, only where new Matter is diſcloſed by the Defendant's Anſwer.

New Interrogatories may be exhibited by leave of the Court, but relating only to Supplement.

On a ſupplemental Bill, the Court, upon Motion, will give leave to add to the firſt Interrogatories, ſo as the new Interrogatories contain nothing but what relates to the Supplement. 1 *Har. Chan. Pract.* 3d. Edit. 273.

Croſs

Croſs Bills.

AT the Civil Law, when the *Reus* was brought in to Anſwer, he was ſaid to be convened, which they called *Conventio*; becauſe the Plaintiff and Defendant met to conteſt; and ſince the Defendant might likewiſe have Demands againſt the Plaintiff, he had liberty to exhibit a Libel againſt him alſo, which they called *Reconventio*: If the *Reconventio* came in before the *Litis Conteſtatio*, then both Cauſes went *pari paſſu*. The ſame probatory Term was aſſigned to both, and the ſame Term given for Publication, but the Defendant was to anſwer on the *Conventio*, before the Plaintiff was to anſwer on the *Reconventio*; becauſe the Plaintiff firſt brought the Defendant into Court to anſwer his Suit; and the Defendant's *Reconventio* was only a Superſtructure upon it: But if the *Reconventio* comes in after the *Lis conteſtata*, there both Cauſes do not go *pari paſſu*; and therefore it does not ſtop the Plaintiff in the Examination of his Witneſſes; but if the Plaintiff be in contempt for not Anſwering on the *Reconventio*, there he is ſtopt from proceeding on his own Cauſe, for he cannot proceed in that Court, when he departs out of it, and muſt be attached to Anſwer. *Maranta*, 91, 2, 3, 4, *&c.*

The Analogy between the Croſs Bill at the Civil Law, and the Croſs Bill in Equity.

But

Ibidem. But if the *Reconventio* comes in after Publication, it will ſtop the Hearing till ſuch Time as the Defendant conteſts it; becauſe, otherwiſe, if the Defendant to the original Libel has Right, he may be injured, as he cannot have a Decree upon the Plaintiff's Libel. *Ibidem*, 357.

Ibidem. Our Law, touching croſs Bills, which is the *Reconventio* with us, agrees in all Things with this; for if the croſs Bill comes in before Iſſue is joined, it goes *pari paſſu* with the original Bill; but if it comes in after Iſſue joined, it cannot go *pari paſſu* with it, and ſtops nothing till the Plaintiff has incurred a Contempt: But if it comes in after Publication, it ſtops the Hearing 'till Anſwer, and the rather with us, becauſe the Defendant has a right to the Plaintiff's Anſwer upon Oath, and if ſuch Bill be filed after Publication, nothing can be put in Iſſue upon it, that was in Iſſue in the original Cauſe.

In what Caſes it is to be brought. And this croſs Bill in Equity, is brought by the Defendant in the original Cauſe againſt the Plaintiff, touching the Matter in queſtion, by way of Compenſation.

Ibidem. And when the Defendant hath a counter Demand againſt the Plaintiff, although he ſhould in his Anſwer inſiſt on that Demand, yet he cannot have a Decree

cree on the Plaintiff's Bill, and muſt therefore bring a croſs Bill.

And this Bill alſo lies againſt the Plaintiff in the original Cauſe by the Defendant, for Diſcovery of Evidence only. Ibidem.

On filing a croſs Bill, Proceſs of *Subpœna* is to be ſerved, as on the original Bill; and if the Plaintiff therein hath anſwered the firſt Bill, and the Time for anſwering the croſs Bill is expired, his Attorney may immediately move the Court, that the Plaintiff, in the original Cauſe, may ſtop his Proceedings, until he anſwers the croſs Bill, and the Court will make an Order for that purpoſe; and a Copy of this Order is to be ſerved on the Attorney of the oppoſite Party. The Proceedings on filing the croſs Bill, and on ſtopping the Plaintiff in the original Cauſe.

And if the Defendant, in the original Cauſe, hath fully anſwered the Bill, and the Plaintiff, in the original Cauſe, hath fully anſwered the croſs Bill, the Attorney for the Plaintiff, in the croſs Cauſe, may, on Motion, obtain an Order, that the original Cauſe, and croſs Cauſe, may be heard together, a Copy of which is to be ſerved on the Attorney for the Plaintiff in the original Cauſe: But notwithſtanding this Order, if the Defendant delays his croſs Cauſe, that muſt not delay the original Cauſe. Original Cauſe, and croſs Cauſe heard together.

Regularly to be brought before Iſſue joined.

And regularly, this Bill is to be filed before Iſſue joined; and if it be, both Cauſes are to proceed *pari paſſu*; if not, the Plaintiff, in the original Cauſe, ſhall be but ſtopped, until he hath anſwered the Bill in the croſs Cauſe; but after he hath anſwered, he muſt have an Order to proceed in the original Cauſe, which the Court will grant him, on Motion of his Attorney, unleſs Cauſe in four Days, and this Order is to be ſerved on the oppoſite Attorney: And if no Cauſe be ſhewn, either by filing Exceptions to the Anſwer, or otherwiſe, in four Days after Service of the Order, upon Affidavit of the Service thereof, and upon producing a Certificate of the Officer of no Cauſe ſhewn, and upon an Attorney's Motion thereon, the Order will be made abſolute.

Plaintiff when he hath anſwered the croſs Bill, is to get leave from the Court to proceed.

Croſs Bill, after Iſſue joined, and yet the Plaintiff, in the original Cauſe, ordered to ſtop until he anſwered the croſs Bill, without prejudice to his Examination of Witneſſes.

In the Caſe of *Braddel* againſt *Gaven*, *& e contra*, in this Court, *Mich.* 1751, a croſs Bill was brought after Iſſue joined, and after the Plaintiff, in the original Cauſe, had examined ſeveral Witneſſes; but the Defendant, in the croſs Cauſe, having applied for Time to anſwer the croſs Bill, the Court upon Motion of the Plaintiff's Attorney, in the croſs Cauſe, made an Order, that the Plaintiff, in the original Cauſe, ſhould ſtop until he anſwered the croſs Bill, but without Prejudice to the Examination of his Witneſſes in the original Cauſe:

Cauſe: *Sed quær.* if this ſhould not have been on ſpecial Application by Counſel, on Notice, as it is in *Chancery*.

But it muſt be brought before Publication is paſſed in the original Cauſe, and not after, except the Plaintiff, in the croſs Cauſe, will go to Hearing upon the Depoſitions already publiſhed; becauſe of the danger of Perjury and Subornation, if the Parties ſhould, after Publication of the former Depoſitions, examine Witneſſes *de novo*, to the ſame Matter before examined unto; and in this Caſe, the croſs Cauſe may be heard on Bill and Anſwer, at the ſame Time with the original Cauſe.

But the croſs Bill muſt be brought before Publication paſſes in the original Cauſe, except the Party will go to Hearing on the Depoſitions already publiſhed, and then both Cauſes may be heard together.

But if there be croſs Cauſes, and one of the Plaintiffs omits to ſerve *Subpœna* to hear Judgment, his Cauſe ſhall not come on at the ſame Time with the other, except the other Party conſents. *Sed vide, poſt.* Pa. 294.

Unleſs one Plaintiff forgets to ſerve *Subpœna*, to hear Judgment.

Where there are croſs Bills, the Defendant, in the firſt Bill, muſt generally anſwer before he, in the laſt, ſhall be compelled to put in his Anſwer, or before he can ſtop the Plaintiff in the orginal Cauſe. See *Moſeley's Rep.* 58. But ſee alſo *Bunb. Rep.* 124, where it is ſaid, not unleſs Proceſs be taken out on the original Bill: And that a Letter miſſive to a Peer, though not ſuch a Proceſs as ſub-

Defendant in the original Cauſe, to put in his Anſwer firſt, and before he can ſtop the Plaintiff in the firſt Cauſe, if Proceſs be taken out on the original Bill.

jects the Party to a Contempt, yet in this Caſe it is ſuch a Proceſs as gives the Party, ſuing it out, Priority of Suit.

Unleſs the firſt Bill be amended after croſs Bill filed.

But if the Plaintiff, in the Original Bill, will, after the croſs Bill filled, amend his Bill in Things material, this amended Bill, as to the Amendments, is a new Bill; and the Plaintiff in the original Bill, ſhall be obliged to Anſwer the croſs Bill (which was filed prior to the Amendments made to the original Bill) before ſuch Time as the Plaintiff, in the Original Bill, ſhall have an Anſwer to his Amendments; and as the amended Bill muſt be anſwered altogether, ſo the Priority, in ſuch Caſe, ſeems to be loſt as to the whole. 2 *Peer Williams* 435.

And an inſufficient Anſwer is no Anſwer.

A. brings his Bill againſt *B.* and *C.* who put in inſufficient Anſwers, and prefer their croſs Bill againſt *A.* afterwards *B.* becomes a Bankrupt, his Aſſignees bring their Bill, in nature of a Bill of Revivor, againſt *A.* they ſhall not go on 'till *C.* has anſwered *A*'s Bill. 1 *Peer Williams*, 266.

Anſwer, in the original Cauſe, inſufficient, yet Defendant having ſworn 800 *l.* was due to him, and not being able to put in a further Anſwer from *Conſtantinople*, where he

But in the Caſe of *Hornby* againſt *Pemberton*, *Moſeley's Rep.* 58, the Anſwer was adjudged inſufficient; but the Defendant having ſworn in his Anſwer, that eight Hundred Pound was really due to him, and not being able to put in a further Anſwer from *Conſtantinople*, where

where he reſided, in leſs than two Years, the Court ordered, that the allowing the Exception ſhould not hinder the Defendant from getting an Anſwer to his croſs Bill, and that he might proceed at Law, ſo far as to aſcertain his Debt, notwithſtanding the Injunction.

reſided, in leſs than two Years, the Court gave him Leave to proceed to get an Anſwer to his croſs Bill.

Where a croſs Bill is filed, when the original Cauſe is in the Paper of Cauſes to be heard, although the Plaintiff, in the original Cauſe be ſerved with *Subpœna*, and appears thereon, yet if he can, before his Time for anſwering is out, bring on the original Cauſe, the Plaintiff, in the croſs Cauſe, cannot ſtop him from going to Hearing; but when the Time for anſwering is out, if the Defendant in the croſs Cauſe, enters a Rule for a *Dedimus*, or prays Time to anſwer, or that for Want of either, the Plaintiff, in the croſs Cauſe, enters an Attachment, then he can ſtop the Plaintiff in the original Cauſe from going to Hearing, until he anſwers the croſs Bill, by a Motion of courſe, to be made by his Attorney: This Practice is the ſame in the *Chancery* and *Exchequer*.

Croſs Bill when the original Cauſe is in the Paper, in what Caſe the original Cauſe ſhall be ſtayed.

If a croſs Bill be filed for Relief, or for Diſcovery only, the Defendant's Anſwer thereto may be given in Evidence, on the Hearing in the original Cauſe, although the croſs Cauſe be diſmiſſed by the Plaintiff himſelf, or by the Defendant for want of Proſecution, and

The Anſwer to the croſs Bill may be given in Evidence, tho' the Bill be diſmiſſed.

alſo, though the croſs Cauſe, if the Bill be for Relief, be not ſet down to be heard, an Order being firſt conceived for that purpoſe: And if both Cauſe, and croſs Cauſe be ſet down to be heard together, the Plaintiff, in the croſs Cauſe, need not ſerve *Subpœna* to hear Judgment on the Plaintiff in the original Cauſe.

If there be an Order for hearing both Cauſes together, the Plaintiff, in the croſs Cauſe, need not ſerve *Subpœna* to hear Judgment.

Croſs Bills when and for what purpoſe firſt introduced.

Croſs Bills were at firſt unwillingly allowed of; the Court foreſaw great Inconveniencies from them, and the Rules relating to them, were introduced by Sir *Nicholas Bacon*: They are in nature of a Defence, and were allowed of, that the Party might more fully have the Benefit of ſomewhat he could not ſo well profit himſelf of, being a Defendant, though it was in Iſſue in the other Cauſe; but they cannot examine to the ſame Matters examined to in the original Cauſe, after Publication, nor after the Matters, in the original Cauſe, are ſettled by the Decree; as appears from the Motions, that are every Day made to enlarge Publication in the original Cauſe. *Cur. Canc.* 323, 324, 327.

Matters examined to in the original Cauſe, and Publication paſſed, or ſettled by the Decree, cannot be examined to in the croſs Cauſe.

Examinations on the croſs Bill, when.

No Examination will be admitted upon a croſs Bill to any Point examined to, and Publication paſſed, or ſettled by the Decree upon the original Bill; nor any Witneſſes examined, who might have been examined, upon the original Bill, without

without Leave of the Court. *Moſeley's Rep.* 382.

Where a Cauſe hath been heard againſt a Defendant upon a Sequeſtration, and a Decree to have the Bill taken, *pro confeſſo*, and the ſame confirmed and enrolled, and the Defendant ſerved with ſuch Decree, and an Attachment iſſued for Non-performance thereof, it is ſaid he ſhall not be admitted to bring a croſs Bill, without depoſiting in Court the Money decreed, if the Decree be for Money; and alſo, the Coſt expended in that Cauſe, or giving good and ſufficient Security for the Performance of the Decree, within ſuch Time as the Court ſhall direct, and firſt paying down, to the Plaintiff, ſuch Coſt as is decreed to him, and the Coſt expended ſince the pronouncing the Decree, with the Coſt of taxing the ſame.

Croſs Bill after a Decree on a Bill taken *pro confeſſo*, and Proceſs for the Performance thereof, on what Conditions.

The reading any of the Pleadings or Proofs, *&c.* in a croſs Cauſe, on the Hearing, in the original Cauſe, muſt be by a precedent Order, on a Motion made for that purpoſe. *Curſ. Can.* 298. and ſo *vice verſa*. But where the two Cauſes are ſet down to be heard together, there, the Depoſitions, in the one Cauſe, may be read in the other Cauſe, without any Motion or Order for that Purpoſe; but a prudent Agent, will, at all Events, be provided with the Order.

The reading of Pleadings, or Proofs in the croſs Cauſe, on the Hearing in the original Cauſe, muſt be by an Order for that Purpoſe.

Where Depoſitions in the original Cauſe are given in Evidence in the croſs Cauſe, Iſſue muſt be joined in the croſs Cauſe.

On a croſs Cauſe you may give in Evidence the Depoſitions in the original Cauſe, but Iſſue muſt be joined in the croſs Cauſe; and though the Rule be, that there can be no Examining after Publication, and therefore the Plaintiff, in the croſs Cauſe, ſhall not be at Liberty to prove his Bill; yet it ſeems hard that the Defendant, in the croſs Cauſe, in whom there is no Default, ſhould be deprived of proving his Anſwer.

Examinations on the croſs Bill, by the Defendant to prove his Anſwer.

Original Bill, and croſs Bill, may be in different Courts.

If a Bill be exhibited in one Court of Equity, there may be a croſs Bill in another; as if the Mortgagor exhibits a Bill to redeem in the *Exchequer*, the Defendant may bring a Bill in *Chancery* to foreclose. 1 *Vern.* 221.

Matter charged in croſs Bill which might have been in Anſwer to original Bill, and it is diſmiſſed, it ſhall be with Coſts.

If in a croſs Bill, any Matter be charged, which was within the Party's Knowledge, at the Time he put in his Anſwer to the original Bill, which he might have made Part of this Defence, and the croſs Bill is dimiſſed, it ſhall be diſmiſſed with Coſts.

Plaintiff in croſs Cauſe puts a Rule on Plaintiff in original Cauſe, to ſtop till he anſwers croſs Bill; he anſwers croſs Bill, but before Time for excepting is out, obtains an Order to proceed in ori-

In the Caſe of *Mdgennis* againſt *Rourk*, *& e contra*, in this Court, 26th *June* 1750, the Defendant in the croſs Cauſe, who was Plaintiff in the original Cauſe, having anſwered the croſs Bill, obtained an Order, before the Plaintiff's Time for excepting was out, for Liberty to proceed in the

original Cauſe, being ſtopped by a former Order from proceeding until he had anſwered the croſs Bill, and then filed Exceptions to the Defendant's Anſwer in the original Cauſe; whereupon Counſel, for the Plaintiff in the croſs Cauſe moved to ſet aſide the ſaid laſt Order for Liberty to proceed, and that the Plaintiff, in the original Cauſe, may ſtop until the Time for excepting to the Anſwer, in the croſs Cauſe, was expired, purſuant to the firſt Order; but the Court would make no Rule, being of Opinion that the Exceptions filed by the Plaintiff in the original Cauſe, were no proceeding within the Meaning of the firſt Order: Beſides the Condition or Foundation, on which the firſt Order was obtained, was, that the Defendant in the original Cauſe had fully anſwered the Bill.

ginal Cauſe, and then files Exceptions to Defendant's Anſwer in original Cauſe, and held regular.

Upon a croſs Bill againſt a Parſon to diſcover what ſort of Tithes, in particular, he claims to be due to him, for that the Parſon in his Bill demanded two different Manners of Tithing; the Court held, that in ſuch a croſs Bill, the Plaintiff need not intitle himſelf to the Juriſdiction of the Court, becauſe the croſs Bill is grounded upon another Bill here in Court. *Har.* 160. Beſides, it is in the nature of a Defence.

An original and croſs Bill, both filed in this Court, the Plaintiff in the croſs Bill need not intitle himſelf to the Juriſdiction of the Court.

So if a Man be ſued here in the Office of Pleas, he may have an *Engliſh* Bill to be relieved againſt the Plaintiff, without ſetting

Nor in a Bill to be relieved againſt a Suit at Law in this Court.

ſetting forth Matter of Juriſdiction. *Ibidem.* But in either Caſe, it can do no Harm to ſet forth the Juriſdiction, and will avoid Litigation.

Plaintiff, in original Cauſe, out of the Kingdom, on Affidavit thereof, the Court will order Service of his Attorney to be good Service; but there muſt be ſuch an Affidavit, although it ſo appears by the original Bill.

Upon a croſs Bill if the Plaintiff in the original Cauſe, be out of the Kingdom, upon Affidavit thereof, and upon Motion of the Attorney for the Plaintiff in the croſs Cauſe, the Court will Order the Service of the Attorney for the Plaintiff, in the original Cauſe to be good Service of him; but an Affidavit to that purpoſe muſt be produced, although it ſhould appear by the original Bill, that the Plaintiff was out of the Kingdom at the Time of filing it, as he might after that, and before the Application for ſerving his Attorney have come into the Kingdom; So determined in the Caſe of *Bruncher* and his Wife, againſt *Nichols* and his Wife, and the contrary, in this Court, 4th *December*, 1756.

How the Plaintiff in the original Cauſe, is to proceed after he hath anſwered the croſs Bill.

When the Plaintiff, in the original Cauſe, hath anſwered the croſs Bill, and that the Time for excepting is out, his Attorney may then, on Motion, obtain an Order for Liberty to proceed in the original Cauſe, unleſs Cauſe be ſhewn to the contrary in four Days after Service of the Order; and if no Cauſe be ſhewn then, on Affidavit of the ſervice of the Order, and a Certificate of no Cauſe ſhewn, the Court, on an Attorney's Motion

tion thereon, on the fifth Day after Service of the Order, will make it abſolute, and the Plaintiff may proceed in his Cauſe.

How far the Order for the Plaintiff, in the original Cauſe to ſtop, until he anſwers the croſs Bill is to extend.

Where a croſs Bill is filed, and the Plaintiff therein hath anſwered the original Bill, and hath obtained an Order for the Plaintiff, in the original Cauſe, to ſtop until he anſwers the croſs Bill; this Order can only extend to the ordinary Proceedings in the original Cauſe, ſuch as replying, *&c.* that is, that the Plaintiff ſhall not take any Steps, to bring his Cauſe to a Hearing, until he has anſwered the croſs Bill, (which is generally for the Diſcovery of Evidence, which the Defendant cannot have, but from the Mouth of the Plaintiff,) but cannot in Senſe or Reaſon, be ever conſtrued to extend to the preventing of any ſpecial Motion, in the original Cauſe, on any incidental or collateral Matter. Lord *Howth* againſt Lady *Howth*, in *Chancery*, *Hillary* Term, 1756.

Bill of Interpleader.

A Bill of Interpleader in Equity, the ſame with the *tertiut Interveniens*, in the Canon Law.

THE Bill of Interpleader in Equity, is the ſame with the *tertius intervenies*, in the Canon Law; which, in both Laws, is, where a third Perſon, who

is

is not Party in the firſt Cauſe, ſuppoſes he has a ſeparate Intereſt, in the Matter in Queſtion, and comes to remove either the Plaintiff or Defendant; and in ſuch Caſe, in this Court, the *tertius interveniens*, or ſuch third Perſon, is to file his Bill againſt the firſt or other Defendants, praying to be relieved according to his Right: Whereupon the firſt Plaintiff makes the ſecond a Defendant, in order to interplead and conteſt the Right; or, if the firſt Plaintiff does not make him a Defendant, then he may exhibit his Bill againſt all the other Parties, and pray that they may interplead, and that the Court may order and decree to which of them the Thing in Demand belongs; and further, as his Caſe requires. As if a Man, as a Mortgagor, brings his Bill againſt the Mortgagee to redeem, and another Perſon, who has a Right to redeem, prefers his Bill againſt both to remove the firſt Plaintiff, and to redeem from the Defendant. So if the Mortgagor brings his Bill againſt the Mortgagee, to redeem, an Aſſignee of the Mortgagee may bring his Bill againſt both, to remove the Defendant, and to receive the Money on the Redemption. *Maranta*, 272. *Gail*, 172. 128. See *Harriſon's Chan. Pract.* Vol. 1. 274. 3d Edit.

It may be to remove either the Plaintiff or Defendant.

So a *tertius interveniens*, or Interpleader, may come in to aſſiſt either Plaintiff or Defendant; as if there be Tenant for Life

Or to aſſiſt either Plaintiff or Defendant.

Life and Remainders in Fee, ſubject to a Mortgage, and Tenant for Life prefers his Bill againſt the Mortgagee to redeem, he in Remainder may prefer his Bill to pay off his Proportion, and be let into the Redemption: So, if there be a Rent-charge granted out of Lands, previouſly ſubject to a Mortgage, and the Mortgagee prefers his Bill to foreclose, the Grantee of the Rent-charge may prefer his Bill againſt the Plaintiff, in order to come in and aſſiſt the Defendant, by tendering of the Money, and to ſave the Eſtate, out of which his Rent charge is to come; but then the *tertius interveniens* muſt not collude with either Party, for he cannot intervene by Fraud or Colluſion to embarraſs another Man's Suit.

A Bill of Interpleader may be where there are ſeveral Claimants of a Debt or Duty, and a third Perſon fears he may be harraſs'd.

There are alſo other Bills of Interpleader, as where there are ſeveral Claimants, and a third Perſon, not knowing to which of them he ought of Right to render a Debt, or Duty, or pay his Rent, fears he may be diſtreſſed or haraſſed by ſome of them, and therefore prays, that they may interplead, ſo that the Court may judge to whom the Thing belongs, and he thereby rendered ſafe, on the Payment thereof; and this he may do whether any Suits be actually commenced againſt him in Law or Equity, or is only in danger of being ſued, or moleſted by the Parties, as when two

Tenants haraſsed by different Landlords, may, by this Bill, ſtop diſtraining; but Affidavit is to be made of no Colluſion, and of the truth of the Allegations of the Bill, and the Rents are to be lodged in Court.

two Perſons claim the Rents of Tenants, then the Tenants may prefer an interpleading Bill, againſt both of them, and the Court will, by Injunction, ſtop the Parties from diſtraining; but then, the Plaintiffs muſt not only file an Affidavit, that they don't collude with any of the Parties, and therein ſet forth the ſeveral Allegations in the Bill, but muſt alſo bring the Rents into Court; for unleſs there be a Stake in a Court of Equity, the Court will not hinder the Claimants by their Injunction, from proceeding at Law. *Car.* 65. *Maxims in Equity*, 32.

A Bill of Interpleader, if admitted, after a Decree.

When a third Perſon comes to remove either Plaintiff or Defendant, or to aſſiſt either Party, he muſt come before the Decree, or elſe it is diſcretionary in the Court, whether they will ſtop the Execution of it; and they never do, when it can be made appear, that the Party knew that the Cauſe was in conteſt, and yet ſtood by without claiming; for then, after the Decree, ſuch Interpoſition is preſumed to be malicious, in order to hinder the Sentence.

This Bill ſhall not be diſmiſſed, for Plaintiff's not replying.

In the Caſe of *Donnell* againſt *Baillie*, in *Chancery*, *Mich.* 1719, a Motion was made, upon a Certificate of no Replication, to diſmiſs a Bill of Interpleader, to prevent Diſtreſſes upon bringing the Rent into Court; but the Court was of Opinion, that a Bill of Interpleader in this Caſe,

Caſe, ſhould not be diſmiſſed, tho' the Plaintiff ſhould not reply.

The *tertius interveniens* when made a Defendant, to diſmiſs his Bill.

Where the Plaintiff can, and will make the *tertius interveniens* a Defendant, and thereby anſwer all the Purpoſes in his Bill, there ſuch third Perſon will be obliged to diſmiſs his Bill.

Death of Plaintiff in a Bill of Interpleader, after Cauſe heard, in what Caſe no Abatement.

If a Cauſe has been heard, upon a Bill of Interpleader, and a Trial at Law, directed to ſettle the Right between the Defendants, there is an End of the Suit, as to the Plaintiff; ſo that, if he afterwards dies, the Cauſe ſhall ſtill proceed, and there needs no Revivor, each Defendant being in the Nature of a Plaintiff. Ruled upon Motion. 1 *Vern.* 251.

There muſt be an Affidavit annexed to the Bill.

In the Caſe of *Errington* againſt the Attorney General, and the Executors of Sir *Rand. Knipe*, *Bunbury*'s *Rep.* 303, upon a Bill of Interpleader, it was agreed *per Curiam*, that there is a neceſſity of annexing an Affidavit to the Bill, or elſe it is demurrable to. But the Reporter makes a Quæry, if there be any neceſſity, where only private Perſons are concerned. But this ſeems to be, or not to be neceſſary, according to the Circumſtances attending the Caſe.

The Affidavit to be annexed to the Bill of Interpleader, what to contain.

In the Affidavit, to be annexed to this Bill, the Plaintiff muſt ſwear, that he doth not in any Sort collude with the Defendants,

dants, or any of them, touching all, or any of the Matters in Queſtion in the Cauſe; and that he doth not exhibit it at the Inſtance, or Requeſt, or with the Privity, of the Defendants, or any of them, or through any Fraud, but of his own free Will, in order to be indemnified, and to avoid being doubly vexed, touching the Matters contained in his Bill.

A Poſſeſſory, or Injunction Bill.

Le Marquis de Lord Fortescue in Dom. Proc. 10. March 1771.

Poſſeſſory Bill what.

THE Poſſeſſory, or Injunction Bill, is a ſummary Method of Proceeding, which hath been, for many Years paſt, practiſed by Courts of Equity in this Kingdom, and is uſed for the reſtoring of Parties to the Poſſeſſion of their Lands, who have been forceably or fraudulently diſpoſſeſſed, or for quieting Parties in Poſſeſſion, according to the different Circumſtances of the Caſe.

Their inſtitution, and the Cauſes thereof.

And theſe Bills are very frequent in this Kingdom, by Reaſon that in the many Rebellions, and Troubles, which have happened here, from Time to Time, the Proteſtants were robbed and and plundered, and their Houſes burnt, with their Effects therein; by which Means, their Deeds and Titles have been loſt or deſtroyed, which rendered the Poſſeſſion the beſt Title to many Eſtates,

Eſtates, and therefore it was found neceſſary, to guard that Poſſeſſion againſt force or fraud, and to reſtore the Perſon fraudulently or forcibly diſpoſſeſſed, until the Right could be tried, by due Courſe of Law: Wherefore if it appears to the Court, that the Perſon who has been diſpoſſeſſed or diſturbed, has had a peaceable and quiet Poſſeſſion, for three entire Years, before the filing of the Bill, ſave the Force or Diſturbance complained of, they will reſtore him, as Poſſeſſion is the Semblance of Right, and the Party giving the Diſturbance, ſhall be left to his Remedy, in the ordinary Courſe of Law, either by an Ejectment, or otherwiſe, as he ſhall think moſt proper.

Poſſeſſion the Matter chiefly conſidered on theſe Bills, not the Right.

Theſe Bills are ſeldom or never uſed in *England*, and the firſt inſtances of this Practice of poſſeſſory Bills here, are to be met with in the preſidency Courts of *Munſter* and *Connaught*; for we find, that in the 13th Year of King *James* the 1ſt, there was an Inſtruction to the Preſident and Council of *Munſter*, which Plans out the Method of Proceeding on theſe Occaſions, in pretty much the ſame Way, which has been ſince purſued, by the Courts of *Chancery* and *Exchequer* here, which Inſtruction is in the following Words, *to wit*:

When firſt uſed here, and on what founded.

" And the ſaid Lord Deputy and " Counſel, do likewiſe by theſe Preſents, " give

Ibidem.

" give full Power and Authority, to the
" Lord Preſident and Counſel, or any
" two or more of them, (whereof the
" Lord Preſident for the Time being,
" ſhall be one); if any Perſon that hath
" been by the ſpace of three Years, qui-
" etly in the Seizin and Poſſeſſion of any
" Lands, Tenements, or Heredita-
" ments, either of Freehold or other
" Term within the ſaid Province, ſhall
" be riotouſly, forcibly, or fraudulent-
" ly diſſeized, expelled, or put out of
" the ſame; or holden out with Force;
" or otherwiſe ſhall be vexed with often
" and continual Suits, and Diſturban-
" ces, that in ſuch Caſes, though the
" Party grieved may have ordinary Re-
" medy by the Common Law, they may
" upon Complaint thereof made unto
" them, by Bill or Information, make
" Order for the ſettling, quieting, or re-
" ſtoring of the ſame Lands, and He-
" reditaments, until the Title or Intereſt
" of the ſame ſhall be decided, or tried
" by the due Courſe of the Common
" Law, as to their diſcretions ſhall be
" thought fit. Provided that in ſuch
" Caſes, the ſurmiſe of the Force, or
" continual Vexation, or Diſturbance
" may be traverſed; and if the ſame be
" not ſufficiently proved by the Plaintiff,
" according to his Complaint, then the
" Matter ſhall be diſmiſſed with good
" Coſts, to be awarded to the Defen-
" dant, (except the Plaintiff in his ſaid

" Bill

" Bill of Complaint, hath alſo alledged " Matter of Equity, and ſo proved the " ſame,) as the Court ſhall ſee cauſe to " Decree for him thereupon." See the 40th Inſtruction, of Inſtructions for the Lord Preſident and Council of *Munſter*, 20th *May*, 1615.

Now, it is highly probable, that this Inſtruction as to that Part of it which relates to Force, was grounded upon the Statutes of 8 *Hen.* 6. and 10 *Cha.* 1. againſt forcible Entries; and it is a generally received Opinion, that the Proceedings in Courts of Equity on poſſeſſory Bills, were founded upon the Equity of the ſaid Statutes, and after the ſaid Statute 10 *Cha.* 1. theſe Bills came into frequent Uſe in Courts of Equity here, the Remedy by the Juſtices of the Peace, being often found inſufficient and inadequate. Ibidem.

But the true Foundation and Origin of theſe Bills, ſeem rather to be grounded on the Proceedings in poſſeſſory Actions at the Civil Law. By that Law, if a Perſon had been honeſtly and fairly in the Poſſeſſion of a Thing, for the Term of a Year, and afterwards was interrupted therein, or diſpoſſeſſed thereof by Force, he might within the Year, to be reckoned from the Day he had been turned out of Poſſeſſion, make his Demand or Complaint thereof, in a Court Seem rather to be founded on the Civil Law, and how the Proceedings were in ſuch Caſes by that Law.

of Juſtice, and alledge, that at the Time of the Force or Interruption, he was in the quiet and peaceable Poſſeſſion of the Thing in Queſtion, not by force, fear, ſecretly or precariouſly; and deſire, that firſt, and before all Things, the Poſſeſſion of the Thing in Queſtion, may be decreed to him, and that he may be put and maintained in the Poſſeſſion thereof: And in ſuch Caſes, the Proceedings were in the quickeſt and moſt ſummary Manner. And this is the Practice of the Admiralty Courts at this Day, where the Proceedings are regulated by the Rules of the Civil Law.

Ibidem. And in theſe poſſeſſory Actions, the Matter touching the Poſſeſſion, was ſecured and regulated in the firſt Place; and when this had been diſpoſed of, then only it was, that Enquiry was made into the Right of the Property: And in Caſe of moveable Things, the Perſon who prevailed in the poſſeſſory Suit, was very often obliged to give Security, to anſwer his Opponent in a petitory Suit, as to the Right, before he was let into, or reſtored to the Poſſeſſion of the Thing in Queſtion, in the poſſeſſory Suit.

Ibidem. And the Decree in the poſſeſſory Suit, ſeems to be founded on theſe among other Reaſons, that the Poſſeſſor was *prima Facie*, preſumed to be the right Owner; and if two Perſons pretended to be Poſſeſſors, he who had been in Poſ-

Poſſeſſion for the ſpace of a Year laſt paſt was preferred; and in many Caſes the Poſſeſſion being the only Title for the Property, and the Perſon who had been in Poſſeſſion, perhaps from Accidents, not able to give any other Evidence of his Title than the Poſſeſſion, and as the Law preſumes the Poſſeſſor to be the right Owner, until a better Title appears; it might be unjuſt to ſtrip the Poſſeſſor of that, which perhaps was his only Title, and put him to a Suit, againſt the Perſon who comes in by Force; and alſo for this other valuable End, to preſerve the public Peace, and to prevent the Miſchiefs and Wrongs which muſt ariſe, from the Attempts of poſſeſſing Things, by a ſtrong Hand and ſuperior Force.

The Laws of *France*, in theſe Caſes.

By the Laws of *France*, one cannot commence his Action for the Property, until the queſtion about the Poſſeſſion has been decided, and that he who ſhall have been condemned, has fully ſatisfied the Sentence, by reſtoring the Fruits, and paying the Coſts and Damages, if any have been awarded: And the Parties are not ſuffered to join theſe two Demands of the Poſſeſſion, and Property together, in one Suit, ſo tenacious are the *French* of the Poſſeſſion, and the Rights which accrue therefrom; and this ſeems to have been taken from the Civil Law, *Is qui deſtinavit rem petere, animad-*

animadvertere debet, an aliquo Interdicto poſſit nanciſci Poſſeſſionem: Quia longe commodius eſt ipſum poſſidere & adverſarium ad Onera Petitoris compellere, quam alio poſſidente, petere. *L.* 29. *ff. de Rei vendicat.*

Now, by our Method of Proceeding, in theſe Suits in Courts of Equity, the Perſon complaining muſt in moſt Caſes, have been in quiet Poſſeſſion by the ſpace of three whole Years together, next before the Day of the Force committed, which Requiſite in theſe Proceedings ſeems to have been taken from the aforeſaid Statute. 10 *Car.* 1. *cap.* 13.

Great Variety of poſſeſſory Bills.

There is great Variety of theſe Bills, which are grounded upon Force; and which follow the ſame Courſe in Practice as the former: As if by Force a Man ſhould ditch in another's Park, or ſome Part of his Land; or ſhould ſtop up an antient Paſſage, which another enjoyed for many Years; or diſturb him in the Enjoyment of an antient Water, or Water-courſe; cut down any Trees, or build up againſt the Windows of any Houſe, and darken and make the Houſe uſeleſs; or if a Tenant ſhould plow an antient Meadow, or make Bricks of the Soil of his Landlord's Ground; the Court of *Chancery* in theſe, and many like Caſes, ſtop the Parties by Injunction;

on; and this Injunction, is in the Nature of a Writ of *Eſtrepment*, at the Common Law: And all Bills grounded on theſe, and the like Circumſtances, where the Relief is immediate, are called poſſeſſory Bills; and the Proceeding, is called *feſtinum Remedium*, becauſe, the Courſe taken on theſe Bills, is ſhorter than the Progreſs of a Proceeding, in any other Cauſe.

Writ of *Eſtrepment*, in what Caſes.

And the Method of proceeding, in theſe Caſes, is this: There is a ſhort Bill filed (in which no *Subpœna* is uſually prayed, nor is there any Anſwer, required thereto) and an Affidavit made, ſetting forth, that the Plaintiff had been in the actual, quiet, and peaceable Poſſeſſion of the Premiſſes for three Years at leaſt, before the filing of the Bill; ſaving the Diſturbances given by the Defendant, that his Title is ſtill in Being, and undetermined, and the Force muſt be particularly ſworn to, as well as the Poſſeſſion; and upon ſuch Affidavit, and upon producing to the Court, a Certificate of the Bill being filed, the Plaintiff may by his Counſel, move the Court without Notice, for an Injunction to the Party, and in ſuch Caſe, the Court will either grant an Injunction to the Party, at the firſt Inſtance, or will grant an Order for an Injunction, unleſs Cauſe be ſhewn to the contrary, within the Time preſcribed for that Purpoſe, by the Order, and to ſtop in the mean Time; and if no ſuch Cauſe be ſhewn,

The Method of Proceeding, on poſſeſſory Bills.

The Affidavit on theſe Bills, and what to contain.

Injunction to the Party, and the Proceedings.

upon Certificate thereof, and producing an Affidavit of the Service of the Order, theCourt, on Counſel'sMotion, will grant an Injunction to the Party: But this is according to the Circumſtances of the Caſe. *Cotter* and *Norcot*, *Eaſter* Term, 1758; and *Kenna* againſt *Minnit*, and others, *Hillary* Term, 1760; both in this Court.

Poſſeſſory Bill againſt a Tenant, holding over. And in what Caſes, a triennial Poſſeſſion need not be ſworn to.

But where a Landlord, brings this Bill againſt his Tenant, for holding over after his Term is expired, which is a forcible, or rather a fraudulent detainer; as where a Perſon had made a Leaſe for ſeven Years to a Tenant, the Landlord, or Leſſor, the Day the ſeven Years are expired, or the Day after, Demands the Poſſeſſion of the Tenant, or Leſſee, and he refuſes to deliver it, the Landlord need not make an Affidavit of a triennial Poſſeſſion, and a Title ſtill in Being as in the other Caſes; for in this Caſe, the Bill is founded upon the Fraud, in which Caſes, Courts of Equity have an original Juriſdiction; for the Tenant is conſidered in Equity, as a Truſtee for the Landlord, and upon this Truſt, and Confidence, between the Landlord, and Tenant, it is deemed a Fraud, if he refuſe to give up the Poſſeſſion, or return it when his Term is expired: But the Landlord, is is to make it appear by Affidavit, that ſuch a Demiſe was, that the Term in that Demiſe is expired, and that the Tenant holds over his Term, and thereupon a Bill is to be framed,

framed, with a Prayer therein to be reſtored, and an Injunction for that Purpoſe, to be put into Poſſeſſion of the Lands ſo demiſed.

Injunction to be reſtored, to the Poſſeſſion.

So when a Party, has been in Poſſeſſion as Tenant for ſeven Years as above, and before that ſeven Years be expired, he may have got a further Term, ſuppoſe of ten Years from his Landlord; in that Caſe, the Landlord cannot have an Injunction becauſe, tho' the ſeven Years be expired, yet the ſubſequent Agreement for ten Years, is a Continuation of that Poſſeſſion which was firſt given for ſeven Years; and if the Landlord ſhould force or diſturb the Tenant in his Poſſeſſion, he upon filing a Bill, and ſetting forth his Caſe, would be quieted by Injunction, upon proper Affidavits of the Matter againſt his Landlord.

The like to be quieted, in Poſſeſſion.

There are alſo many other Caſes, to which this Remedy cannot be extended, if a triennial Poſſeſſion was requiſite; as where Leaſes are made by Purchaſers, Deviſees, and Remainder Men, on coming to their Eſtates, which are to expire within three Years.

Other Caſes, where a triennial Poſſeſſion is not requiſite.

But if the Leaſe be made, by the Perſon from whom the Purchaſe is made, the Deviſor, or Tenant for Life, theſe Bills do not lie without a triennial Poſſeſſion in the Purchaſer, Deviſee or Remainder Man, becauſe the Purchaſer, Deviſee,

Deviſee, or Remainder Man had no Poſſeſſion of their own, at the Time of their Leaſe, and there is no priority between them and thoſe under whom they derive, ſo as to continue to them the Confidence and Truſt, which was between Landlord and Tenant.

priority

Where there is a mixt Poſſeſſion, a poſſeſſory Bill will not lie.

If it ſhall appear, that there has been a mixt Poſſeſſion, that is to ſay, a Poſſeſſion, held partly by the Plaintiff, and partly by the Defendant, ſo that it cannot be ſaid, that either of the Parties, has had a triennial Poſſeſſion, there it ſeems, the Court will not interpoſe by Bill of this kind, but will leave the Parties at Liberty to diſpute the Right at Law: But where there ſhall appear a contrariety of Evidence with Reſpect to the Poſſeſſion, as if the Plaintiff's Witneſſes ſhall ſwear that the Plaintiff has had the ſole Poſſeſſion for three Years, and the Defendant's Witneſſes ſhall ſwear, that he has had it; there it ſeems, it has been the Practice of Courts of Equity here, to direct an Iſſue to aſcertain that Fact; as in all other Caſes, where the Evidence is contradictory: So determined in the Caſe of the Lord Mayor, *&c.* and Citizens of *Dublin* againſt *Vernon*, in the Court of *Chancery*, in 1731; and the like Determination, was made in the ſame Court, in the Caſe of *Moor* againſt *Cahill*, which Cauſe was heard in *Trinity Term*, 1745:

The Court will direct an Iſſue, on a Contrariety of Evidence.

1745: But the Lord *Chancellor*, did not give Judgment, until the *Hillary Term*, following.

It has been a Queſtion, in Courts of Equity on theſe Bills; where a Man, deviſes his Lands from the Heir, and he enters immediately, after the Death of the Anceſtor, and holds the Poſſeſſion by Force, if the Deviſee ſhall be reſtored by this Bill; but it now ſeems to be the prevailing Opinion he ſhall not; for the firſt Preſumption is, that the Land deſcended, which is a probable Title, and can only be defeated by eſtabliſhing the Will, and that were to go into the Validity of the Title; but if the Heir ſuffers the Deviſee to take up the Poſſeſſion, immediately after the Death of the Deviſor, and to hold it for ſome Time, and ſhould afterwards, and within three Years, after the Deviſor's Death, attempt to remove the Deviſee by Force, it may deſerve to be conſidered whether the Deviſee, in that Caſe, as he may juſtify a forcible detainer at Law, may not apply by poſſeſſory Bill, to be quieted againſt Force; it may alſo deſerve Conſideration, whether in that Caſe the Deviſor's Poſſeſſion, is not continued without Interruption; and whether that, and a probable Right, may not intitle the Deviſee, to be quieted againſt Force.

If a Deviſee, ſhall be reſtored againſt the Heir at Law.

Upon

The Poſſeſſion to be demanded within a Year, but if the Intereſt of the Plaintiff be expired, Application is to be made within ſix Months.

Upon theſe Bills, it is generally underſtood, that the Application to be reſtored, or quieted, ought to be made, within a Year after the Force, or Fraud committed: And if the Intereſt, under which the Party complaining derived, be expired, Application is to be made, in ſix Months after ſuch Expiration, or the Court will make no Order, unleſs he makes it appear, that he held over, as Tenant at Will; or by ſome new Leaſe. *Sed quær.* for this ſeems to be a Matter not abſolutely ſettled.

Plaintiff muſt apply in Time.

An Objection, was made in the Caſe of *Flack* againſt *Neſbet*, in the Court, that the Plaintiff had not come timely enough; and he would have been diſmiſſed, but that he ſhewed, he did not acquieſce, but had filed two Bills before, which were diſcontinued, for ſome informality.

And an actual Poſſeſſion, muſt be ſhewn for the three Years.

And upon theſe Bills, where a triennial Poſſeſſion is to be ſworn to, it muſt alſo appear, the Plaintiff has had an actual Poſſeſſion for that Time by himſelf, or his Tenants: So determined in the Caſe of *Maple* againſt *Vernon*, in May 1730; upon an Appeal to the Houſe of Lords, from an Order of the Court of *Chancery* here, although the Plaintiff, on filing the Bill, had ſworn that the Premiſſes in diſpute, were his Property, and that he

he had been intitled to, and ſeized, and poſſeſſed thereof, for upwards of nine Years, before the Time of filing his Bill, by Virtue of Deeds of Leaſe, and Releaſe, from the Lord Mayor, *&c.* and Citizens of *Dublin.*

The Right, or Title, not to be enquired into, in theſe Suits; the Poſſeſſion only.

But in theſe Suits, it ſeems that there is no Neceſſity to go into the Right, or the Title, but into the Queſtion of the Poſſeſſion only, ſo that the Plaintiff has a Title ſtill in Being; and a feaſible Title will be ſufficient: And in a late Caſe between Sir *Fitzgerald Aylmer*, and others Plaintiffs *Barnewall Fitzgerald*, and others Defendants, which depended in *Chancery*, before the late Chancellor, Lord Viſcount *Jocelyn*, upon a poſſeſſory Bill, an Iſſue being directed, upon the Trial at an Aſſizes, the Plaintiffs were ſuffered to go into Evidence, of the original Right, and Title, to the Lands in Queſtion; whereupon, the Jury found a Verdict for the Plaintiffs: But upon ſhewing this Matter to the Court of *Chancery*, his Lordſhip was pleaſed to ſet aſide the Verdict, and ordered a new Trial, and afterwards, upon the ſecond Trial, the Parties not being ſuffered to give Evidence of any Matter, except ſuch as tended to ſhew the triennial Poſſeſſion, the Jury found a Verdict for the Defendants; and the Plaintiffs having applied to the preſent Lord Chancellor for a new

a new Trial, it was refuſed, and the Cauſe being afterwards heard, an Injunction went to the Sheriff with Coſts.

If upon Service of the Injunction, the Poſſeſſion be reſtored, there is an End of the Suit, and the Plaintiff ſhall have no Coſts.

If the Defendant, being ſerved with the Injunction, delivers up the Poſſeſſion, or ceaſes giving freſh Diſturbances, there is an end of the Suit; and in this Caſe, the Plaintiff has no Coſt. See the Caſe of the Executors of *Magee*, againſt *Hodgkinſon*, in this Court, *Hillary Term*, 1754: But if the Defendant refuſes to give up the Poſſeſſion, or to quiet the Plaintiff, the Plaintiff ſhall, upon Affidavit of the Service of the Injunction to the Party, and of the detaining of the Poſſeſſion, or of continuing of the Force and Diſturbance, have an Injunction to the Sheriff, and ſometimes an Attachment; except the Defendant will juſtify his Right to the Poſſeſſion, *&c.* and then he muſt appear, as on an Attachment, and put a Rule on the Plaintiff to exhibit his perſonal Interrogatories, as in Caſe of any other Contempt, which being done, the Defendant muſt anſwer them in Time, or an Injunction will iſſue to the Sheriff on a Certificate from the Chief Remembrancer of no Anſwer being filed.

Injunction to the Sheriff.

Injunction to the Party, the Time for appearing, thereto.

On ſervice of an Injunction, to the Party, the Defendant has eight ſitting Days to appear after Service, and if no Appearance

Appearance be entered in that Time, the Plaintiff may, on Affidavit of the Service, move for an Injunction to the Sheriff.

Appearances upon the Attachment how to be.

And note, the Appearances, upon theſe Contempts, are to be in open Court, that is, when the Attorney for the Party in Contempt moves, that the Proſecutor, may exhibit his Interrogatories; he at the ſame Time, informs the Court, that the Party, in Contempt conſents to appear, as upon an Attachment.

Time for Exhibiting Interrogatories.

When the Defendant has appeared, his Attorney is to put a Rule on the Plaintiff, to file his Interrogatories; and if the Plaintiff, ſhall not file his Interrogatories, within four Days after Service of the aforeſaid Order, the Court, upon an Affidavit of the Service thereof, and Certificate of no Interrogatories being filed, will diſſolve the Injunction, upon an Attorney's Motion.

The Time for anſwering them.

When the Interrogatories are filed, then the Plaintiff's Attorney is to put a Rule on the Defendant, to anſwer them in the uſual Time (which is but four Days, unleſs the Defendant obtains ſome further Time, which the Court will grant, on an Attorney's Motion, if the Defendant has made no unreaſonable delay,)

delay,) and if the Anſwer be not filed, in four Days after Service of the Order, and no further Time obtained, the Court, on Affidavit of the Service thereof, and a Certificate of no Anſwer being filed, will, upon Counſel's Motion, grant an Injunction to the Sheriff.

The perſonal Interrogatories and Anſwer thereto, how to be proceeded on.

The perſonal Interrogatories, and the Anſwer thereto, are to be proceeded on in the ſame Manner, as where perſonal Interrogatories are exhibited, in Aid of an Account. See *Title Account.*

The Time for excepting to the Anſwer.

The Time for excepting to Anſwers to theſe Interrogatories, and the Proceedings thereon, are the ſame as upon Exceptions to the Anſwers of Defendants to Bills.

How the Defendant is to proceed, if after he hath anſwered the Interrogatories, the Plaintiff ceaſes his Proſecution.

If the Plaintiff ceaſes his Proſecution, or neglects to prove his Caſe, after the Defendant hath anſwered the Interrogatories, the Court, on Motion of the Defendant's Attorney, will order the Plaintiff to proceed, and prove his Contempt in ſome reaſonable limited Time after Service of the Order, or the Injunction to be diſſolved; and if the Plaintiff ſtill makes Default, on Certificate thereof, and on Affidavit of the Service of the Order, the Court, on an Attorney's Motion, will diſſolve the Injunction: But note, the ſhort Vacation after *Eaſter* Term

Term, is generally not accounted a Vacation to examine in.

In *Chancery*, the Plaintiff is to prove his Caſe, in a Month after the Defendant hath anſwered the Interrogatories, but in this Court, there is no certain limited Time.

The Cauſe to be ſet down to be heard on the Examinations.

If when the Defendant, has fully anſwered, and denied the Contempt, the Plaintiff takes out a Commiſſion to prove the Contempt; and the Defendant joins in the Examination, when the Witneſſes are examined, and the Examinations cloſed, upon Motion of the Plaintiff's Attorney, the Cauſe ſhall be ſet down to be heard on the perſonal Interrogatories, Anſwers and Proofs; and this Order is to be ſerved on the oppoſite Party, and alſo a *Subpœna to hear Judgment* as on other Hearings. See hereafter, *Title Hearings.*

How Plaintiff is to proceed, if the Defendant does not join in the Examination.

And if the Defendant, will not join in the Examination, the Plaintiff, when he hath examined his Witneſſes, may alſo, as ſoon as other Hearings, proceed to Publication, and the Hearing of the Cauſe.

On Injunction to the Sheriff the Coſts to be forthwith paid, or an Attachment to iſſue of Courſe for it, and the poſt Coſt.

By a Rule 6th *May*, 1718, in all Caſes of Injunctions to the Party, for quieting of Poſſeſſions, where the Plaintiff appears as on a Attachment; if on the

Hearing of the Cauſe, the Court ſhall ſee Cauſe, to order an Injunction to the Sheriff to quiet, and put the Plaintiff into Poſſeſſion of the Lands, and Premiſſes, in Diſpute with Coſts; that in all ſuch Caſes, the Defendant is forthwith to pay down the taxed Coſts, or an Attachment to the Purſuivant ſhall iſſue againſt him of Courſe, and without any Motion, and he not to be diſcharged therefrom, until the Coſt, and alſo the poſt Coſt, be paid, and the further Order of this Court, for his Diſcharge.

Writs of *Eſtrepment*, the Proceedings thereon.

The Proceedings on Injunctions, in nature of Writs of *Eſtrepment*, are the ſame as upon Injunctions, to reſtore and quiet, *&c.*

Injunction to the Party in what Caſes he may, and when he may not repeat the Facts complained of.

But after the Party is ſerved with the Injunction, he is not to repeat the Facts complained of; as to cut Timber, plow antient Meadow, *&c.* within the ſpecial Order of the Court; but if the Defendant anſwers, and claims an Eſtate of Inheritance to his own uſe, or under ſuch Title, or Eſtate, as is diſpuniſhable of Waſte, the Court will not reſtrain him.

Injunction to the Sheriff upon the Report of a ſhort Anſwer, and before it is confirmed.

And note, in all Caſes of Bills for quieting Poſſeſſions, the Plaintiff ſhall have an Injunction to the Sheriff, upon the Report of a ſhort Anſwer, to the perſonal Interrogatories, and before it is confirmed,

confirmed; becauſe it is *feſtinum Remedium*; ſo ordered in this Court, in the Caſes of Lord *Kingſland* againſt *Kellen*, *Hutchins* againſt *Hutchins*, and *Morris* againſt *Morris*, *Hillary*, 1741.

Unleſs further Anſwer be filed, before the Motion for an Injunction, but not if it be a ſecond ſhort Anſwer.

But if a further Anſwer be filed before the Motion be made for an Injunction to the Sheriff, the Court will receive it, and will not grant the Injunction; but this will not be allowed in caſe a ſecond Anſwer be reported ſhort, ſo ordered in this Court, in the Caſes *Goodman* againſt *Coghlan*, and *Morris* againſt *Morris*, 24th *February* 1741.

Injunction to the Party, he is to be examined on perſonal Interrogatories; but where a Day to ſhew Cauſe, is given, the Court will hear him by Affidavits.

The 1ſt of *February* 1698, the Court declared, when an Affidavit for an Injunction is full, they will grant an Injunction to the Party; and if the Party has a mind to conteſt the Matter, he muſt come in and be examined on perſonal Interogatories: But where the Court gives a Day to ſhew Cauſe (which is not frequently done) they will hear what Defence the Defendant can make by Affidavit or otherwiſe.

But if it appears by the Plaintiff's Affidavits, that he hath had the Poſſeſſion required on theſe Bills, the Court will grant the Injunction.

But if it appears by the Plaintiff's Affidavit that he hath had ſuch Poſſeſſion as aforeſaid, the Court always grants the Injunction; it being a matter of Fact to be tried on Examination, and not by Affidavits; and the Injunction is only in the Nature of a Summons to the Party,

to appear and put the Matter into examination; the Proceedings on Bills of this Nature, being ſummary as aforeſaid.

Injunction to the Sheriff on Demurrer to this Bill.

In the Caſe of *Stratford* againſt *Richardſon* in this Court, *Hillary* 1741, it was determined that an Injunction ſhould iſſue of courſe to the Sheriff on a Demurrer to this Bill.

The ſeveral ſorts of Injunctions on theſe Bills.

And the Injunctions which iſſue upon theſe Bills are either to gain a Poſſeſſion, or to retain and defend it; if to gain a Poſſeſſion, then they enjoin, that the Plaintiff ſhall be reſtored and quieted, either againſt Force or againſt Tenants holding over: If to retain and defend a Poſſeſſion, then they injoin that the Plaintiff ſhall be quieted only.

The Practitioners to be very careful and exact in the Proceedings in theſe Suits.

As the Proceedings in theſe Suits are quick and ſpeedy, it behoveth the Practitioners to take ſpecial Care to conform to the Rules laid down for theſe Suits, and alſo, that their Clients give in full and ſufficient Anſwers to the Interrogatories; for if the Defendant doth not anſwer in proper Time, or if his ſecond Anſwer ſhall be found materially ſhort, an Injunction will go to the Sheriff.

An Anſwer to perſonal Interrogatories, received after an Injunction to the Sheriff, on ſpecial Circumſtances.

In the Caſe of *Smith* a Minor, againſt *Perry* and others in the *Exchequer* in *Hillary* Term 1760, the Defendant not having put in his Anſwer to the perſonal Inter-

Interrogatories in proper Time, the Plaintiff obtained an Injunction to the Sheriff; and eighteen Months after, the Defendant came and prayed Leave to file his Anſwer, ſhewing by Affidavit, that his Attorney had miſtaken the manner of Proceeding, as to the Time given in theſe Cauſes for anſwering; that the Defendant *Perry* had languiſhed under a Sickneſs for a long Time, of which he died; and that as the Plaintiff's Interrogatories had required the Defendant to anſwer ſeveral Matters as to the Title, and the Defendant could not for a long Time come at the Title Deeds, or the knowledge of the Title, ſo as to be able to give a ſufficient Anſwer, and was by the Plaintiff's Interrogatories led into great Difficulties in anſwering, the Court upon the particular Circumſtances of the Caſe, were pleaſed to Order that on payment of the Coſts of the Application, the Defendant's Anſwer to the perſonal Interrogatories ſhould be received notwithſtanding the Injunction to the Sheriff, and the Poſſeſſion to be continued until the hearing of the Cauſe: And note, in this Motion, the Caſe of *Barry* againſt *Barry* in this Court, was mentioned by the Defendant's Counſel as a ſimilar Caſe.

In what Caſes Injunctions ſhall be granted on theſe Bills, and the Proceedings thereon, ſee *Title Injunctions.*

And in what Caſes, they ſhall be granted, and the Proceedings thereon.

Bills of Review and Reverſal.

Of the method of reviewing Cauſes at the Civil Law.

THE Sentences by the Civil and Canon Law, are two fold, Interlocutory and Definitive. The Interlocutory, are any Orders pronounced by the Judge, in the Cauſe touching the Proceedings, before they come to a definitive Sentence; and the interlocutory Order is always alterable before the definitive Sentence. The definitive Sentence muſt always be in Writing, and cannot be altered after it is pronounced and ſigned by the Judge; but after it is ſo ſigned, there might be an Appeal to a ſuperior Juriſdiction: But where they were in the laſt reſort, as when it came up to the Prince, there they might appeal from the Prince uninformed to the Prince better informed, which was in nature of a review of the ſame Sentence. *Maranth.* 362, 363, 364. *Vallences*, 209. 217. 218.

How Bills of Review in Equity correſpond therewith.

Thus it is in the Courts of Equity; for all Orders are interlocutory, until they come to the definitive Sentence which is ſigned by the Court for that Sentence, ſigned and enrolled is the definitive Sentence in the Cauſe, and all preparations before that, are but interlocutory: For the Decree pronounced on the Hearing, which is taken down by the Regiſter, is but an interlocutory Sentence,

Sentence, till it comes to be ſigned and enrolled by the Judge of the Court.

Hence it is, that if the Counſel are diſſatisfied with the Sentence or Decree, as it is firſt pronounced, they may Sign a Petition for Re-hearing, and the Court will grant one, at leaſt, before they ſign and enroll ſuch Decree.

The Cauſe may be re-heard, before the Decree is enrolled.

But no Bill of Review can be brought to reverſe, or ſet aſide a Decree, until after the Decree is enrolled: But although a Decree is not generally to be altered after Enrollment, but by a Bill of Review and Reverſal; yet in ſome Caſes this Rule has been diſpenſed with, and the Decree rectified by Motion of Council; as if part of the Decree has been omitted in the Enrollment, or where an Error has been committed by the Officer in the caſting up of Sums, and in ſuch like Caſes, where the Error appears to be only *Vitium Scriptoris*, or the fault or miſtake of the Officer in making up the Decree.

But no Bill of Review is admitted, until the Decree is enrolled.

In what Caſes, a Decree may be rectified by Motion, after it is enrolled.

By the 53d general Rule, no Bill of Review and Reverſal, is to be admitted without leave of the Court; and except it be for Error in Law, apparent in the body of the Decree, without Averment, or further examination of the Matter of Fact, or except it be on new Matter, ariſen ſince the Decree, whereof the Party

RULE 53. Bill of Review, in what Caſes, and the Requiſites to be performed, on obtaining it.

could not before, have had advantage; which being made appear to the Court by Affidavit, a Bill of Review may be exhibited. And in caſe of miſtaking any Sum, the ſame appearing demonſtratively to be a Miſtake in the auditing or numbering, the ſame may be rectified by Order without a Bill of Review; and on a Bill of Review, no Proceſs of Contempt is to iſſue for not anſwering, until the Plaintiff in ſuch Caſe, enter into a Recognizance to the Defendant, with Securities of a fit Penalty to anſwer all Coſts and Damages, if the ſaid Bill be diſmiſſed, and alſo to perform the Decree made againſt him, except the performance of it extinguiſheth the Parties Right at common Law, as in making of Aſſurances, Releaſes, acknowledging Satisfaction, cancelling of Bonds, or the like: In ſuch Caſes, the Court will diſpenſe with the performance of that part of the Decree, and he ſhall only pay the Coſts mentioned in that Decree, and poſt Coſts. See *Title Coſts*, *Title Decree.*

No Proceſs of Contempt to iſſue on theſe Bills, until the Plaintiff therein, hath entered into Recognizance, and the Condition of ſuch Recognizance.

Ibidem. In the Caſe of *Grace* againſt *Rolls* in this Court, *Mich.* 1732, the Plaintiff obtained a Decree, for the meſne Profits of Lands in the *King's County*. Ordered, That the Money ſhould remain in Court, until Mr. *Grace* anſwered the Bill of Review and Reverſal, or until he ſhould give ſecurity to perform the Decree upon the Bill of Review and Reverſal, if a Decree

cree ſhould be made thereon for Mr. *Rolls*; and that Mr. *Rolls* ſhould alſo enter into Security to pay Coſts, if the Bill of Review and Reverſal ſhould be diſmiſſed.

Upon the filing of a Bill of Review and Reverſal, the Plaintiff ſhould thereupon, obtain an Order, for Liberty to proceed thereon: And in the Caſe of *Keating* againſt *Hepburn* in this Court, *Trin.* 1745, it was determined, That no Proceſs ſhall iſſue on this Bill, but by Leave of the Court, upon Counſel's Motion, and Notice, and on giving the uſual Security.

Order to be obtained, for Liberty to proceed on this Bill.

A Bill of Review, and Reverſal, ſhall not be admitted, nor any other new Bill to change, or alter the Matter decreed, until the Party hath obeyed the Decree in all things, which ſtand upon the Strength of the Decree only, and wherein the Court can ſet him in as good a State again as he was, in Caſe the former Decree ſhould happen to be reverſed. *Quær.* if the Plaintiff will ſwear that he is not able to perform the Decree, and will ſurrender himſelf, to lie in Priſon, until the Matter be determined on the Bill of Review.

Decree to be firſt obeyed.

In the Caſe of *Swift* and *Lightburne*, in 1722, the Plaintiff in the Bill of Review was obliged only to give Security to

That Rule diſpenſed with.

to pay the Coſts on the Bill of Review, and to abide the Decree, but not to pay down the Sum, adjudged to be paid by the former Decree. The Coſt taxed on the firſt Decree was afterwards ordered to be paid *Lightburne* out of the Money then in Court, on his Recognizance.

Ibidem. In the Caſe of *Grace* againſt *O'Hara*, in this Court, the Defendant entered into Security, to pay the Coſts of the former Decree, and to perform the Decree on the Bill of Review. This Bill of Review, was as well for Error, apparent in the Decree, as for Matter ariſen ſince the pronouncing the Decree upon the firſt Bill.

Plaintiff if poor may, upon Affidavit thereof, bring a Bill of Review, without paying Coſt.

Plaintiff allowed to bring a Bill of Review, without paying Coſts in the original Cauſe, he ſwearing he was not worth forty Pounds, beſides the Matters in Queſtion. 1 *Vern.* 261.

Matter, before in the Party's Knowledge, no Ground for this Bill.

But no new Evidence, or Matter, which might have been uſed in the firſt Cauſe, and of which the Party had the knowledge, ſhall be ſufficient Grounds for a Bill of Review. 3 *Ch. Rep.* 76.

No new Witneſſes to be examined on this Bill, who were, or might have been, examined on the former Bill.

No Witneſſes, which either were, or might have been examined on the former Bill, ſhall upon the Bill of Review be examined to any Matter.

Nor

Nor ſhall there be any Examination upon this Bill, unleſs it be to Matter happening ſubſequent to the Hearing, which was not in Iſſue in the original Cauſe, or upon Matter of Record, or Writing not known before; for if the Court ſhould give them Leave to enter into Proofs, upon the ſame Points that were in iſſue, that would be under the ſame Miſchief as Examination of Witneſſes after Publication, and a manifeſt inlet to Perjury.

No Examination to any Matter in Iſſue, in the original Cauſe.

Upon bringing the Bill of Review, there muſt be a Motion made by Counſel, to ſtay the Execution of the Decree.

On a Bill of Review, Motion to be, to ſtop the Execution of the Decree.

Though there be no Limitation to the bringing a Bill of Review, yet after twenty Years, they ſhall not reverſe a Decree, but upon very apparent and flat Errors. See *Cha. Ca.* 382.

Decree ſeldom reverſed after twenty Years.

The Party againſt whom ſuch Bill is filed, on being ſerved with a *Subpœna*, to review and reverſe, and having appeared thereunto, uſually puts in a general Demurrer, that the Decree is not erroneous; for he rarely or never anſwers, unleſs ordered thereto by the Court. And on arguing of this Demurrer, the whole Matter within the Decree is brought in Judgment before the Court, whether the Decree be erroneous or not, and it is affirmed or reverſed accordingly.

General Demurrer uſually put into this Bill.

But

New Matter, ſince the Decree cannot be determined on Demurrer only; and it muſt be inſiſted on by Bill, and cannot come in by way of Anſwer only.

But although Matter ariſen ſince the Decree, may be introduced in the Bill of Review; yet in the Caſe of *Bernard* againſt *Woodley* and *Dixon* in this Court, *Hillary* Term, 1748, it was reſolved, that ſuch ſubſequent Matter, cannot be determined on a Demurrer only, and that all Facts dehors the Decree, muſt be inſiſted on by the Bill, and not to come in by way of Anſwer only.

No new Bill after Demurrer, allowed.

If a Man brings a Bill of Review, to which there is a Demurrer, and the Demurrer allowed, he cannot afterwards bring a new Bill of Review. 1 *Vern.* 44. 417. *S. P.* becauſe it may be infinie, and *expedit Reipublicæ ut ſit finis Litium.*

Demurrer to a Bill of Review, if allowed, may be enrolled; but not if over-ruled.

Where a Demurrer to a Bill of Review is allowed, it may be enrolled; but if over-ruled, that cannot be enrolled, ſo as to prevent the Demurrer's being re-argued. *Hillary* 1690, between *Woots* and *Tucker*. 2 *Vern.* 120. *per Cur.*

No Bill of Review, after a Bill of Review.

A Bill of Review, lies not after a Bill of Review. 1 *Vern.* 135. 2 *Cha. Ca.* 133. on the aforeſaid Maxim *Intereſt Reipublicæ ut ſit finis litium.*

On what Terms a Bill of Review may be brought after an Attach-

A Bill of Review and Reverſal is not to be brought after an Attachment hath iſſued, for Non-performance of a Decree

to

to have a Bill taken *pro confeſſo*, without performing the Decree, or giving ſufficient Security to perform the ſame, if the Court ſhall think fit ſo to direct, and firſt paying down to the Plaintiff ſuch Coſt as is decreed to him, and the Coſt expended ſince the pronouncing of the Decree, and the Coſt of taxing the ſame. See *Hearing upon Bills* taken *pro confeſſo*.

ment for Non-performance of a Decree, to have have a Bill taken *pro confeſſo*.

As in the Caſe of Bills of Revivor, ſo alſo in Bills of Review, none but ſuch as are Parties or Privies, can commonly bring them; and therefore, a Deviſee cannot bring a Bill of Review, becauſe he is not in Privity: But in ſome Caſes, where a Man's Intereſt is affected, or he is aggrieved by a Decree, he may have this Bill; as where a Pariſh was ſued, and four of the Pariſhioners named only to defend, another Pariſhioner may bring this Bill. 1 *Cha. Ca.* 123. 272.

Who may bring Bills of Review.

The Matters aſſigned for Error muſt appear in the Decree itſelf; for being enrolled, it is ſuch a Record as muſt be tried by it ſelf; and no Errors can be aſſigned on a Bill of Review, but Errors in Law; which muſt appear from the Facts ſtated in the Decree; ſince the Court cannot judge beyond that: And if new Matter be diſcovered afterwards, as a Releaſe, Receipt, *&c.* which the Party had not Knowledge of at the Hearing;

The Errors muſt appear in the Decree.

New Matter must be, by Leave of the Court, upon Affidavit of it's not being in the Knowledge of the Party, at the Hearing.

ing; an Affidavit thereof must be annexed to the Bill, and the Plaintiff may pray the Answer of the adverse Party, to this new Matter. 1 *Vern.* 166. 2 *Williams* 284. 1 *Cha. Ca.* 54.

A Fact mistaken at the Hearing, may be rectified by a re-hearing.

But if a Fact be mistaken at the Hearing, and in the decretal Order, that may be rectified upon a re-hearing. 1 *Cha. Ca.* 54.

Decree impossible, contradictory, or repugnant, may be reversed.

If a Decree, or any part of it, be in the nature of Things impossible, or if it be repugnant, one part contradictory to the other, it is erroneous, and may be reversed on a Bill of Review. 1 *Cha. Ca.* 86.

Decree against a Statute, may be reviewed, and reversed; or if the Chancellor errs in Law.

If a Decree be against a Statute, it may be reviewed and reversed: So if the Chancellor errs in a Decree, in a Matter of Law, and it appears within the Decree, this Decree may be reviewed for this Error. 1 *Roll. Abr.* 332.

If the Chancellor errs in Matter of Fact, it cannot be reviewed; nor can an original Bill be brought, but a Bill of Review may be where he errs in Conscience, on a Matter of Fact.

But if the Chancellor errs in his Decree upon Matter of Fact, the Decree is final and cannot be reviewed; because the Parties cannot go to a new Examination of Witnesses now, for after Publication this may not be done. 1 *Roll. Abr.* 382. And where the Decree is final, and cannot be reviewed, it is also observed, that it cannot be altered by original Bill, unless for Matter subsequent: And yet if the Chancellor errs in his Con-

Conſcience, upon a Matter of Fact, proved before him, there may be a review of this Matter, becauſe there needs no new Examination, but this may be reviewed upon the old Depoſitions, which is uſual. 1 *Roll. Abr.* 382. *vide Cha. Ca.* 45.

Upon a Bill of Review, the Party cannot aſſign for Error, that any of the Matters decreed, are contrary to the Proofs in the Cauſe, but muſt ſhew ſome Error, appearing in the Body of the Decree, or new Matter, diſcovered ſince the Decree, and that with Leave of the Court. 1 *Vern.* 166.

It cannot be aſſigned for Error, that the Matters decreed, are contrary to the Proofs in the Cauſe.

An Infant may bring a Bill of Review. *Cha. Ca.* 384.

An Infant may bring this Bill.

Forgetfulneſs or Negligence of Parties, under no incapacity, is no foundation for a Bill of Review. 1 *Har. Ch. Pract.* 3d Edit. 291.

Forgetfulneſs or Negligence, no foundation for this Bill.

And no Objection ſhall be allowed upon a Bill of Review, that is not aſſigned for Errors. *Ibidem.*

No Objection to be allowed, but what is aſſigned for Error.

Objections to a Maſter's Report, cannot be aſſigned for Error, upon a Bill of Review. *Har. Cha. Pract. Ibidem.*

Objections to a Maſter's Report, cannot be aſſigned for Error.

A Fine, and Non-claim, is a good Bar to a Bill of Review. 1 *Vern.* 290.

Fine and Non-claim, a good Bar to this Bill.

In

A ſupplemental Bill may be added in it.

In a Bill of Review, a new ſupplemental Bill may be added. 1 *Vern* 135.

What ſhall be a ground for a Bill of Review.

It has been inſiſted on as a Rule, that nothing ſhall be a Ground to direct a new Trial, to avoid a Judgment at Law, that would not be a Ground for a Bill of Review, to reverſe a Decree; and that a Confeſſion ſubſequent to the Decree, is no Ground for a Bill of Review, nor is the Want of an Evidence, or Matter which might have been uſed in the firſt Cauſe, and of which the Party had then Knowledge. 3 *Ch. Rep.* 76. 1 *Cha. Ca.* 43. *S. P.* 2 *Cha. Rep.* 45.

Error in the Decree, muſt appear on the Face of the Decree itſelf.

If a *Feme Sole* exhibits a Bill, and during the Proceedings marries, and no Notice is taken of it, but the Cauſe proceeds, and there is a Decree for the Defendant, this will not be ſufficient Cauſe to reverſe the Decree, being no Error appearing in the Decree, but a Matter which ſhould have been pleaded in Abatement, and of which the Defendant alone might have taken advantage. 1 *Ca. Rep.* 231.

Ibidem.

So if a Mortgagor has a Decree againſt the Mortgagee, to have a Redemption, and, pending a Reference, the Suit abates by the Death of one of the Parties Defendants, but the Account goes on, and the Maſter is attended by

by the Executor of the Party dying, and makes his Report, which is confirmed, and decreed: This after twenty Years ſhall not be ſufficient Error, ſo as to intitle the Deviſee of the Mortgagor to a new Account. 30 *Car.* 2. between *Slingſby* and *Hale*, 1 *Cha. Ca.* 122.

If a Party would review a Decree, by way of original Bill, the other Party may plead the former Decree in Bar.

After a Decree, if the Party againſt whom the Decree is made, intends to review it, but proceeds by way of original Bill, and not in Form, or with the Ceremonies of a Bill of Review, the Defendant in this new Cauſe may plead the Decree in Bar. 2. *Har. Cha. Pract.* 422.

Bill of Review lies not for Coſts only.

In the Caſe of *Woodley* againſt *Bernard*, and *e contra*, in this Court, *Hillary* Term, 1748; it was determined, that a Bill of a Review lies not for Coſts only.

No Relief for an original Bill againſt a Decree inrolled, it can only be by a Bill of Review.

In the Caſe of *Taylor* againſt *Sharpe*, 3 *Williams* 372, it was laid down as a Rule, that if a Decree be obtained, and that Decree inrolled, ſo that the Cauſe cannot be reheard upon Petition, the Party grieved, can in no Caſe ſet aſide this Decree, or get Relief againſt it by an original Bill; for then the Decrees of the Court would be oppoſite, and contrary, one to the other, which would

breed the utmoſt Confuſion: Wherefore, the only Remedy in ſuch Caſe is by Bill of Review, which muſt be either for Error appearing upon the face of the Decree, or upon ſome new Matter, as a Releaſe, Receipt, *&c.* proved to have been diſcovered ſince; for, unleſs this Relief were confined to ſuch new Matter, it might be made uſe of as a Method for a vexatious Perſon to be oppreſſive to the other ſide, and for the Cauſe never to be at reſt.

Bill of Review, meerly on the matter of Equity, on what Evidence.

Where a Bill of Review is meerly on the Matter of Equity, it ſhould be on ſuch Evidence, as would vary the Determination of the Court.

Ibidem.

The Evidence muſt have exiſted the Time of the making the former Decree, and have come to the Parties Knowledge ſince the making the Decree.

Alſo where it is to reverſe a Decree founded on a Verdict.

In a Bill of Review to reverſe a Decree founded on a Verdict, it is ſufficient, if the new Evidence be of ſuch a Nature, as might, had it been produced at the Trial, have induced the Jury to have given a different Verdict.

Bills

Bills original, after Decrees.

AN original Bill, may be brought to execute, or confirm a Decree, or to carry an Act of Parliament into Execution; or to revive, or inforce the Performance of Decrees: A Decree has been explained, by original Bill, upon a Matter ſubſequent to the Decree, but may not be explained upon a Matter Precedent to it: And this Bill lies, to put a Period to a temporary Decree, *&c.* After a Decree for Enjoyment of Lands, a ſecond Bill may be exhibited for the meſne Profits, and for further Aſſurance, *&c.* See 1ſt *Harriſon's Ch. Pract.* 292. 3d. Edit. It may alſo be brought to ſet aſide a Decree obtained by Fraud, or Colluſion. 1 *Chan. Ca.* 250. 1 *Williams*, 723. *Talbot's Rep.* 201. But See Page 337. and 3 *Williams*, 372. See alſo Title *Decrees*, and *Diſmiſſes*. Original Bill after a Decree in what Caſes.

Where a Decree is temporary, or for ſpecial Ends, an original Bill lies, to ſhew that the Purpoſes of the Decree are ſatisfied, and to put a Period to it. 2 *Ch. Rep.* 128. Ibidem.

No Original Bill ought to be admitted, to explain a Decree upon any Matter of Fact, precedent to the Decree. 1 *Ch. Ca.* 45. Ibidem.

Ibidem.

An original Bill, to execute a Decree of Lands againſt a Purchaſer, who claimed under Parties bound by that Decree, has been allowed good on a Demurrer put in by the Defendant. 1 *Ch. Ca.* 231.

Bill to have the Benefit of a former Decree, no Witneſſes to be examined.

If a Bill be brought to have the Benefit of a former Decree, the Plaintiff cannot examine Witneſſes, much leſs the ſame Witneſſes to the Matters in Iſſue in the former Cauſe: But on ſuch a Bill, the Court may examine the Juſtice of the former Decree; but then, it muſt be by Proofs taken in the Cauſe, wherein that Decree is made. *Per. Cur.* 2. *Vern.* 209.

An original Bill barely in nature of a Bill of Revivor, does not open the firſt Decree.

An original Bill, barely in Nature of a Bill of Revivor, to revive or enforce former Proceedings, and not more comprehenſive than a Bill of Revivor only, does not open the firſt Decree to have it looked into; but if it be to enforce a Decree, or carry it further, then it opens the Cauſe. *Paſch.* 1706, *Vare* and *Wordal.* See *Harriſon's Ch. Pract.* 3d. Edit. 294.

Bills quia timet, *and in what Caſes proper: And herein of Bills to perpetuate the Teſtimony of Witneſſes, to Wills, or Deeds.*

WHERE a Perſon is intitled to any Thing, after a certain Length of Time, which for that Interval is to be uſed by another, and may be waſted or deſtroyed; or where a Perſon is intitled to a Thing, after the Death of another, who is to have the Uſe of the ſame during Life; or where a Man may be injured by another's neglecting or refuſing to do what he is bound to do, or the like, in ſuch Caſe, a Bill *quia timet* is proper, and the Plaintiff ſhall be relieved, according to the Nature and Circumſtance of his Caſe. It is founded on this Maxim, *That Equity prevents Miſchief.*

Bills *quia timet* what, and in what Caſes proper.

A. had the uſe of Goods, and a Library for Life, Remainder to the Plaintiff's Wife, who was dead; but he as her Adminiſtrator brought his Bill, to have the Goods, *&c.* ſecured to him, after the Death of *A.* which was decreed accordingly, 12 *Car.* 1. between *Bracken* and *Bently.* 1 *Ch. Rep.* 110.

Where one has the Uſe of Goods for Life.

A Bill was brought to deliver up an Apprentice's Bond and Indentures, he being out of his Time, and it was ordered,

That a Man may ſue his Apprentice within a Year, or deliver up his Indentures.

dered, that the Maſter do either bring his Action within a Year, or deliver up the Bond and Indentures: For if it were at the Maſter's Choice, to ſtay as long as he pleaſed, he would perhaps ſtay 'till the Apprentice's Witneſſes were dead. 17 *Car.* 2. between *Baker* and *Shelbury*, 1 *Ch. Ca.* 70.

That an Executor may not waſte the Aſſets.

The Defendant's Teſtator gave the Plaintiff one thouſand Pounds, to be paid at the Age of twenty one Years; the Bill ſuggeſted, that the Defendant, who was Executor, waſted the Eſtate, and therefore the Plaintiff prayed, that he might give Security for the Payment of the Legacy, at ſuch Time as it ſhould become due, which the Maſter of the Rolls decreed accordingly. *Hill.* 2. ch. 2. between *Duncumbun* and *Stint.* 1 *Ch. Ca.* 121.

That Tenant for Life, may pay the Arrears of a Rent Charge.

If *A.* being ſeized of Lands in Fee, grants a Rent-charge iſſuing thereout, and afterwards deviſes the Lands to *B.* for Life, Remainder to *C.* in Fee, and dies; *C.* may compel *B.* to pay the Arrears, for fear all ſhould fall on *C.* in reverſion; although it was urged, that this was a remote Poſſibility. *Hill.* 25. *Car.* 2. between *Hayes* and *Hayes.* 1 *Ch. Ca.* 223.

And his Proportion of Mortgage Money, to keep down the Intereſt.

So if Tenant in Fee mortgages his Eſtate, and deviſes it to one for Life, Re-

Remainder to another in Fee, Equity will compel the Tenant for Life, to bear his Proportion of the Mortgage, (which is uſually a third Part,) or will make him keep down the Intereſt. Ibidem, and 1 *Ch. Ca.* 271. *Max. of Equity*, 14.

But if he in Remainder does not come in the Life-time of the Tenant for Life, he ſhall have a Decree againſt his Executor, in Proportion only to the Time the Tenant for Life lived. 1 *Vern.* 404.

But the remainder Man muſt come in the Life-time of the Tenant for Life, or he ſhall recover only in Proportion, &c.

If *A.* is bound for *B.* and has a Counter-bond from *B.* and the Money is become payable, on the original Bond, Equity will compel *B.* to pay the Debt, tho' *A.* is not ſued; for it is unreaſonable a Man ſhould always have ſuch a Cloud hang over him. *Per North*, Lord-Keeper. 1 *Vern.* 190.

May be brought by a Surety, to compel the Obligor to pay the Debt.

The Court will grant an Injunction, to ſtay Waſte, on Affidavit of a Contract for the Sale of the Timber, and it is the great Uſe of coming into Equity for an Injunction to prevent. It was ſo inſiſted on by the Attorney General, in the Caſe of Lord *Falmouth* and others againſt *Innis* and others. *Moſely*'s Reports, 92.

The Court will grant an Injunction *quia timet*, to ſtay Waſte on Affidavit of a Contract for the ſale of Timber.

Under this Head of Bills *quia timet*, may be placed the Bill to perpetuate the Teſtimony of Witneſſes to Deeds, or Wills; and this Bill is, where a Perſon

Bills in *perpetuam Rei Memoriam*, in what Caſes.

hath a Will, or Deed, or any other Writing, under which he has a Title or claim to Lands, or any other Benefit thereby, and would preſerve the Evidence of the Witneſſes thereto; or where he is inclined to prove any Facts, where a Diſpute may not probably ariſe, until after the Deaths of the Witneſſes.

The Method of examining Witneſſes, in *perpetuam Rei Memoriam*, at the Civil and Canon Laws.

In the Civil and Canon Law, they had a Manner of examining Witneſſes, in *perpetuam Rei Memoriam*, which was two fold, either the common Examination, or in *meliori Forma*. The common Examination was, when Witneſſes were very old and infirm, or ſick and in danger of Death, or were going into other Countries. And in this Caſe, it was uſual to file a Libel, and without ſtaying for the *Litis Conteſtatio*, the Plaintiff examined his Witneſſes immediately, and gave Notice, (if it were poſſible) to the other Side, of the Time and Place of the Examination, that he might come and croſs examine ſuch Witneſſes, if he thought fit, and theſe Depoſitions ſtood good, in Caſe the Witneſſes died, or went abroad; but the Plaintiff was obliged to *edere actionem* within a Year, otherwiſe theſe Examinations went for Nothing; but if the Witneſſes lived, or did not go abroad into other Countries, they were to be re-examined, *poſt Litem conteſtatam*. *Gail*, 162, 3, 4. *Venat. Analyſis*, 251, 2, 3, 4, 5, 6, *&c.*

The

The Examination, in *perpetuam Rei Memoriam*, in *meliori Forma*, *ad tranſumenda Inſtrumenta*, and in this Caſe, there muſt be a *Litis Conteſtatio* before the Examination; becauſe there is no need of ſo much Expedition in proving of Inſtruments, as there is where the Witneſſes are likely to die, or are going into remote Parts; in theſe Caſes, they are not confined to proceed in any Action, upon theſe Inſtruments within a Year, but in both Caſes, it ſeems that the *Publicatio Teſtium* was, when the Judgment was begun before the Ordinary, or, which is all one, when there was a *Litis Conteſtatio*. *Venat. Ibidem.* Ibidem.

Bills in *perpetuam Rei Memoriam* what to contain, and againſt whom they are to be brought.

And with theſe two Methods of Proceeding at the Civil Law, our Proceedings in Courts of Equity on Examinations *de bene eſſe*, and in *perpetuam Rei Memoriam*, do greatly correſpond, and this Bill to perpetuate, *&c.* is to be againſt the Heir at Law, and all Perſons concerned in Intereſt; and is to ſuggeſt the Matter and the Facts, as fully as the Nature of the Thing will admit; and the Will or Deed is to be recited, in *hæc verba*: The Witneſſes Names muſt be ſet forth, and the Places of their Abode, with their Additions; and the Interrogatories, upon which the Witneſſes are to be examined, are to be annexed to the Bill, and generally, at the Foot of the Interrogatories the Witneſſes Names are ſet

ſet forth their Additions, and places of Abode; in which Interrogatories the Will or Deed is alſo ſet forth, in *hæc verba*: And if the Bill be only to perpetuate Teſtimony, the Plaintiff is not to pray general Relief, as is uſual in other Bills, but prays that the Defendant may ſtand to, and abide ſuch Order, as the Court ſhall make; and alſo prays *Subpœna*, and the Proceedings are the ſame as upon other Bills.

RULE. 77. The Proceedings thereon.

By the 77th general Rule, he that will examine Witneſſes, in *perpetuam Rei Memoriam* to preſerve a Teſtimony, muſt firſt exhibit his Bill, and annex his Interrogatories thereto, and ſhew his Title to the Thing; and that the Witneſſes, to prove it, are old and infirm, and not like to live long, whereby he is Danger to loſe it; and the Names of ſuch Witneſſes, are to be mentioned in the Bill, and then pray a Commiſſion to examine them, and a *Subpœna* to the Parties intereſted, to ſhew Cauſe, if they can, to the contrary.

If Cauſe be ſhewn in 14 Days Plaintiff muſt deſiſt.

If the Party intereſted being duly ſerved, do within fourteen Days ſhew Cauſe, the Plaintiff muſt deſiſt; and if he cannot, the Plaintiff may go on alone, if the other do not join with him; as he may, if he will; and then fourteen Days Notice is to be given, of the Exami-

amination, in which Caſe, the Court will appoint Commiſſioners.

There ſhall generally be no Publication of theſe Depoſitions while the Witneſſes live, nor ſhall they be made Uſe of to be given in Evidence againſt any other, but the Defendant who was warned to defend, his Heirs, or Aſſigns, or ſome other claiming by, or under him.

The Depoſitions only to be made uſe of againſt the Defendant who was warned, or thoſe deriving under him.

And in all Caſes, where Relief is prayed by theſe Bills, the Depoſitions taken thereon ſhall not be read upon the Hearing, if the Plaintiff might have examined the Witneſſes in Chief.

Depoſitions on theſe Bills where Relief is prayed not to be uſed, if Plaintiff might have examined in Chief.

It is ſaid, this Bill doth only lie where the Plaintiff is in Poſſeſſion, or where the Bill is brought to ſupport a Right, where the Plaintiff cannot bring his Action at Law, as in Caſes of Remainders by Deeds, or Wills, *&c.* and the Defendant is not to examine, but croſs examine. 1 *Vern.* 308. 441.

In what Caſes only, this Bill is allowed.

Defendant only to croſs examine.

But in 1ſt. *Williams*, 117. in the Caſe of *Philips* againſt *Carew*, a Bill was brought to diſcover a Title to Land, and for an Account of the Profits, and to perpetuate Teſtimony, *&c.* the Defendant anſwered as to the Title, and demurred as to prepetuating Evidence, in regard the Plaintiff might bring his Ejectment, and examine his Witneſſes at the Trial.

In what Caſes the Bill is allowed.

And

Ibidem. And upon the Affidavit, that the Plaintiff's Witneſſes were infirm, and unable to travel, the Demurrer was over ruled by the Maſter of the Rolls; and afterwards by the Lord Chancellor on a Re-hearing: But it was admitted by the Lord Chancellor, that without an Affidavit, the Demurrer would have been good; it being the common Suggeſtion in a Bill, and when ſworn, if ſuch Demurrer ſhould be, it might introduce great inconveniences, and Hardſhips, and a Failure of Juſtice.

The Age and Condition of the Witneſſes, to be ſuggeſted in the Bill, and an Affidavit to be made thereof.

How this was at the Civil Law. But note, at the Civil Law, if the Perſon againſt whom the Supplication was to be formed, was to be Actor, there was no Neceſſity to inſert the Age of the Witneſſes; and that they were Invalids; becauſe ſuch Actor, not being confined to proceed within the Year, but left at Liberty to proceed at any Time; the Supplicator was admitted to examine any Witneſſes he thought fit; ſince otherwiſe he might be in Danger of loſing them. *Venat.* 256.

The Proceedings to perpetuate the Teſtimony of Witneſſes, to a Will. Where Lands are deviſed by Will, and there is no Opportunity to prove, or eſtabliſh it at Law, and that it is proper to perpetuate the Teſtimony thereto, in this Court; the Courſe now is, to exhibit a Bill againſt the Heir at Law, and ſet forth the Will in *hæc Verba*, and

and annex the Interrogatories, thereto; and the Defendant having anſwered, they muſt proceed to Iſſue as in other Caſes, and examine the Witneſſes to the Will; and the Will is to be left with the Examiner to be examined to.

Upon theſe Bills, the Defendant may croſs examine the Plaintiff's Witneſſes, but he cannot examine any Witneſſes on his Side, if he has any to examine, he muſt alſo file a Bill to perpetuate, *&c.*

Defendant commonly croſs examines, unleſs he alſo files a Bill.

Depoſitions taken on theſe Bills, are not ordinarily to be publiſhed, but upon Oath that the Witneſſes are dead. *Pract. Reg.* in *Canc. fo.* 35, 36.

Depoſitions not to be publiſhed until the Witneſſes be dead.

After Publication granted on a Bill to perpetuate, the Plaintiff ſhall not be admitted to have any more Examination on his Behalf concerning the ſame Matter.

No farther Examination after Publication.

As at the Civil Law, upon theſe Bills to perpetuate, there could be no *Publicatio Teſtium* until there was a *Litis Conteſtatio*; ſo in Equity, if the Defendant heretofore ſtood out all the Proceſſes of Contempt for not appearing, or in Caſe of Appearance, for not anſwering; the Plaintiff had no Means, in ſuch Caſe of proceeding, to have the Teſtimony of his Witneſſes perpetuated.

Formerly in Equity, as at Civil Law, there could be no perpetuating of Teſtimony, till the Defendant had anſwered, but this is remedied by ſtatute.

But

How to proceed on theſe Bills, if the Defendant will not appear, or after Appearance neglects to anſwer.

But by 13 *Geo.* 2d. in all Suits now, or hereafter in Equity in this Kingdom, againſt any Perſon, or Perſons, to have Teſtimony of Witneſſes perpetuated, where all, or any of the Defendant, or Defendants, either for not appearing, or in Caſe of Appearance, for not anſwering, or other Cauſe, hath, or ſhall ſtand out Proceſs of Contempt to a Sequeſtration, and that the Sequeſtrators return: That no Eſtate or Effects of ſuch Defendant, or Defendants, are found within this Kingdom to be ſequeſtred, the Plaintiff in every ſuch Caſe, upon publiſhing in the *Dublin Gazette*, two Days in each Week, for ſix Weeks ſucceſſively, the Names of the Plaintiff, and Defendant, and mentioning which of the Defendants have ſo run into Contempt to a Sequeſtration; and the ſaid Return, ſhall and may, upon Application to the Court, be at Liberty to examine his Witneſſes againſt ſuch Defendants, ſo in Contempt, and paſs Publication of the Depoſitions, as if ſuch Defendant had appeared and anſwered, and the Cauſe had been regularly at Iſſue, and Publication paſſed according to the courſe of the Court.

How the Plaintiff is to proceed to hear the Cauſe, if on ſuch default as aforeſaid he cannot examine in Chief.

And in all ſuch Suits, for perpetuating the Teſtimony of Witneſſes, wherein the Party Plaintiff hath, or ſhall have examined his Witneſſes, *de bene eſſe*, and the Defendant hath, or ſhall ſtand out

out Proceſs of Contempt to a Sequeſtration for not appearing, or in Caſe of Appearance, for not anſwering; and ſuch Return had as aforeſaid, or for any other Cauſe, ſo as the Plaintiff cannot examine his Witneſſes in Chief, the Plaintiff, on giving Notice in the *Dublin Gazette* as aforeſaid, ſhall upon Application to the Court, have Publication of ſuch Depoſitions, and the Cauſe, as againſt ſuch Defendants in Contempt ſhall be proceeded on, upon the Sequeſtration and Return; and the ſame ſhall be as effectual againſt ſuch Defendants, as if they had appeared and anſwered, and the Cauſe had regularly proceeded to Iſſue, and the ſaid Depoſitions had been taken upon an Examination in Chief, according to the Courſe of the Court.

No perpetuating the Teſtimony of Witneſſes, to the Will of a Lunatick in his Life-time.

If one makes a Will, and afterwards becomes a Lunatick, a Bill will not lie to perpetuate the Teſtimony of the Witneſſes to it, in the Lunatick's Life-time. 1 *Vern.* 105.

This Bill not proper in the Life-time of Tenant for Life.

If there are two Perſons, and each of them pretend to be the Purchaſer of a Reverſion after an Eſtate for Life, and one them exhibits his Bill to try his Title, and to perpetuate the Teſtimony of his Witneſſes, ſuch Bill will be diſmiſſed, not being proper in the Life-time of Tenant for Life. 2 *Vern.* 159.

A Bill

Witneſſes's examined in *perpetuam Rei Memoriam*, to prove a *Modus decimandi*.

A Bill was exhibited to examine Witneſſes's in *perpetuam Rei Memoriam*, to prove a *Modus decimandi:* The Defendant demurred, for that the Bill was to eſtabliſh a Cuſtom againſt the Church, and in Prejudice of Tithes, which are due *communi Jure*; and ſeveral Precedents were cited where Bills to have a *Modus* decreed, were upon a Demurrer diſmiſſed: But this Bill being only to preſerve Teſtimony, the Lord Keeper thought it reaſonable the Defendant ſhould anſwer, and over-ruled the Demurrer. 1 *Vern.* 185.

Demurrer to a Bill, to perpetuate the Teſtimony of Witneſſes to a Will by a Purchaſer, who had not notice thereof allowed.

But where a Bill was exhibited to prove a Will, and to perpetuate the Teſtimony of Witneſſes, the Defendant pleaded himſelf a Purchaſer without Notice of any ſuch Will; and inſiſted that unleſs there had been a Verdict in Affirmance of ſuch Will, (nothing hindering the Plaintiff, but that if he had a Title he might recover at Law,) the Plaintiff ought not to be admitted to examine the Witneſſes, thereby to hang a Cloud over a Purchaſer's Eſtate; and upon Debate the Court allowed the Plea. *Hillary*, 1685, between *Bechinal* and *Arnold*. 1 *Vern.* 354.

Bill only to perpetuate the Teſtimony of Witneſſes to a Will, if to be brought to a Hearing.

A Bill was brought by a Deviſee of Land, to perpetuate the Teſtimony of a Will, and to eſtabliſh the Will; and upon

upon opening thereof, the Maſter of the Rolls diſmiſſed the Bill with Coſts; declaring that a Cauſe for perpetuating the Teſtimony only, ought not to be ſet down for Hearing.

And upon Counſel for the Plaintiff, praying that Diſmiſſion might be without Prejudice to the Plaintiff, making uſe of the Depoſitions, his Lordſhip replied there was no Need of this; becauſe the Plaintiff would, at Law, have the Benefit of theſe Depoſitions, though the Bill was diſmiſſed. 2 *Williams*, 163. Ibidem.

But the Practice now is otherwiſe, for the Cauſe is ſet down to be heard and a Decree to perpetuate is had. Ibidem.

Upon a Bill to perpetuate the Teſtimony of Witneſſes, touching a Right to a Way, the Plaintiff muſt ſet out the Way exactly in his Bill, *per & trans*, as he ought to do in a Declaration at Law: And in this Caſe the Lord Keeper ſaid, he would not allow theſe Bills for ſuch trivial Things, as right of Common, or for Ways, or Watercourſes, or at leaſt not till after a Recovery at Law. 1 *Vern.* 312.

If this Bill be brought to perpetuate the Teſtimony, &c. touching a right to a Way, it muſt be ſet forth with Certainty; and this Bill not to be brought for trivial Things till after a Recovery at Law.

Proceedings upon the Execution of a Commiſſion to examine Witneſſes in *perpetuam Rei Memoriam*, are the very ſame as upon a general Commiſſion.

The Proceedings on the Examination on theſe Bills, are the ſame as in other Caſes.

For the Examination of Witneſſes de bene eſſe, ſee Title Interrogatories, &c.

Bills of Peace.

Bills of Peace what, and in what Caſes proper.

A Bill of Peace is a Bill to prevent the Multiplicity, or Circuity of Suits, and is allowed as a proper Bill in Equity, to avoid unneceſſary Charges at Law.

Where ſeveral Tenants of a Manor pretend a Right.

Upon a Motion for a new Trial, after Verdicts upon two Iſſues, which were directed, the one to try, whether the Lord of a Manor had a Grant of a free Warren, and the other, in Caſe he had a Grant of a free Warren, whether there was ſufficient Common left for the Tenants: Lord Chancellor ſaid, that thoſe Matters were properly triable at Law; but it being urged that the Bill was brought to prevent Multiplicity of Suits, and was in Nature of a Bill of Peace, a new Trial was granted, upon Payment of full Coſts. *Mich.* 1681, between *How*, and the Tenants of *Muſgrave.* 1 *Vern.* 22. *Cary*, 3. Bills of Peace proper in Equity. 1 *Vern.* 266. Where ſeveral Tenants of a Manor claimed a Right to the Profits of a Fair, and a Bill was allowed to eſtabliſh it.

A Bill

That one Commoner may accept the like Damages, which another recovered at Law.

A Bill ſhewing that one Commoner had recovered one Shilling, or other ſmall Damages againſt the Plaintiff, for oppreſſing the Common, or for uſing the Common, where he ought not; and therefore that the Defendant, another Commoner, may accept of like Damages for what is paſt, to prevent Charges at Law, is in Nature of a Bill of Peace, and proper in Equity. 1 *Vern.* 308.

To prevent circuity of Suits.

A. directed *B.* to pay *C.* what Sums *C.* ſhould want; *C.* accordingly received two Sums of Money (amongſt others) of *B.* for which he gave Receipts, as by the Order of *A.* *A.* and *C.* come to an Account, which, being ſtated, they gave mutual Releaſes; but the two Sums not being entered in the Book of *A.* were not accounted for by *C.* *B.* not having received any Allowance from *A.* for the two Sums, prefers his Bill againſt *C.* to have the Money paid back; *C.* confeſſed the Receipts, but inſiſted that he ought not to pay the Money, for that they never had any Dealings together, but upon the Credit of *A.* and it was to be preſumed, that the Plaintiff had an Allowance from *A.* he never paying the Defendant any Thing, but upon the Credit of *A.* and the Receipts ſo worded: But the Court decreed, that the Defendant ſhould return the Money, for the Plaintiff has a fair Claim againſt the Defendant, to avoid Circuity of Suits;

for otherwiſe it would only turn the Plaintiff on *A.* and *A.* on the Defendant again in Equity, to ſet aſide the Releaſe, and to have an Allowance of theſe Sums, which Decree was affirmed, upon an Appeal to the Houſe of Peers. *Show. P. C.* 17. *Rac. Eq. Ca.* 79.

Perpetual Injunctions, in what Caſes granted on theſe Bills.

If a Truſt Eſtate be deviſed to be ſold, and on a Bill brought againſt the Truſtees to ſell, the Heir conteſts the Will, after two Trials in its favour, Equity on a Bill of Peace, will grant a perpetual Injunction. 2 *Williams*, 672.

Ibidem.

So after ſeveral Trials in Ejectment, and Verdicts, all in favour of the Will, Equity on a Bill of Peace, will grant a perpetual Injunction. *Ibidem*, 672.

Ibidem.

But Equity will the rather grant a perpetual Injunction, where it directs the Tryal, or where the Cauſe, againſt which the Verdicts are found, is odious in it's Nature. *Ibidem*, 673, 674.

Ibidem.

In the Caſe of the Earl of *Bath*, againſt *Sherwin*, *Trin.* Term 1706, the Title was a meer Legal one, where, after ſeveral Ejectments, and five Verdicts for the Earl of *Bath*, he brought a Bill of Peace, for a perpetual Injunction; the Lord Chancellor *Cowper*, thought this too much for him to grant, but ſeemed to recommend it, to the Plaintiff, as a Cauſe proper for the Houſe of Lords,

and

and on an Appeal, the Lords granted a perpetual Injunction. The Reaſons his Lordſhip gave for refuſing the Injunction were, that to give the Court an original juriſdiction, there ought to be a Fraud or a Truſt, or ſome Accident fall out in the Caſe, to prevent ſome great Inconvenience, but that this Caſe, he ſaid, was in it's Nature new, and did not fall under the general Notion of a Bill of Peace, this being only between *A.* and *B.* and one Man is able to contend againſt another; and if the Courts of Law, on new Demiſes, will not ſuffer the former Verdicts to be pleaded, he could not help it; that he was ſatisfied of the vexatiouſneſs of the Defendant in this Caſe, but if it was a Grievance, it was in the Law, which was proper for another Juriſdiction, *viz.* the Parliament to reform; and that it would be arrogance in him, by Decrees or Injunctions, to take upon him the Reformation of the Law; but afterwards, in the Caſe of *Leigh* againſt *Leigh*, in *Mich.* Term 1720, Lord Chancellor *Parker*, mentioned the above Caſe, and declared that he took the Houſe of Lords, their granting a perpetual Injunction, as a Reverſal of the Lord *Cowper*'s Decree, and as a Precedent in the higheſt Court, of what ought to be in this Caſe; and that conſequently it was very improperly ſaid, that only the Houſe of Lords in ſuch Caſe, ſhould grant a perpetual Injunction; for

that Houſe on an Appeal, gives ſuch a Judgment, as the Court below ought to have done: And, ſays he, this Court in directing Trials, and ordering Writings to be produced, has been doing Nothing all this while, if it cannot grant a perpetual Injunction, which really after ſo many Trials, ſeems to be for the Benefit of both Parties. *Prec. in Cha.* 261. 1 *Williams* 672. And this Decree was affirmed in the Houſe of Lords with forty Pounds Coſts.

Contempts and Miſdemeanours.

Contempt, how defined.

A Contempt is defined to be a Diſobedience to the Court, or an Oppoſing, or Deſpiſing the Authority, Juſtice, and Dignity thereof.

In what it conſiſts.

It conſiſts in not doing, or omitting to do ſomething commanded, or enjoined; as not appearing, or not anſwering in due Time: This ſort of Contempt is accounted the ſmaller and leſſer Sort of Contempt, and in ſuch Caſes, Attachments iſſue, generally to the Sheriff, and not to the Purſuivant; and the Rule is, that a Party thus in Contempt, ſhall not

not be heard, until he has purged his Contempt, by doing what he omitted, and paying Coſt. See *Title Proceſs.*

Or it conſiſts in doing ſomewhat againſt the Order of the Court, which is accounted the greater Contumacy; and in ſuch Caſes, Attachments iſſue to the Purſuivant; a Perſon thus in Contempt, is generally not to be heard by the Court, until he is actually in Cuſtody; but this Rule ſometimes admits of Exceptions, as when the Party apprehends the Court had not ſufficient Foundation for granting the Order for the Attachment; in ſuch Caſe, he may be admitted to move againſt the Order. Ibidem.

Contempt againſt the Authority, Juſtice or Dignity of the Court, is incurred, either by the ſerving the Proceſs of the Court, or by the Parties ſerved, or to be ſerved, or other Perſons in their behalf. Contempt againſt the Authority, Juſtice, or Dignity of the Court of two ſorts.

Of the firſt Sort, are ſuch Perſons as abuſe the Proceſs of the Court, by wilfully doing any Wrong in executing them, or making Uſe of them as Handles to do Wrong; or they who do any Thing under Colour or Pretence of the Proceſs or Authority of the Court, without ſuch Proceſs or Authority. Firſt, of ſuch as abuſe the Proceſs of the Court.

It is a great Contempt to terrify Witneſſes, that are to examined, it is an exceeding great Contempt, to forge or Contempts.

counterfeit the Proceſs, or Seal of the Court.

Secondly, of ſuch who oppoſe the Proceſs of the Court,

Of the ſecond Sort, are ſuch as oppoſe or obſtruct the Execution of the Proceſs of the Court, or uſe Force to the Parties who ſerve them, or utter Words importing Scorn or Reproach, or diminution of the Court, its Proceſs or Order; Officers, or Miniſters, upon executing the Proceſs.

Contempt againſt an Order; the Order in the General to be ſerved.

As to the Contempts againſt an Order, the Party muſt generally be ſerved with the Order, before it can be brought into Contempt for not obeying it; but if the Party was actually preſent in Court, when the Order was pronounced, or if he be a Servant or Miniſter of the Court, upon whom the Order is made, as an Attorney, *&c.* it may be otherwiſe: And if the Fault be againſt a ſtanding Rule of the Court, there needs no Notice in ſuch Caſe.

What Caſes excepted.

Ibidem.

In the Caſe of *Adcock* againſt *King*, a Copy of Notes atteſted, was ſerved on a Sheriff, to prevent a Sale on a *Fieri Facias*, he ſold, and adjudged no Contempt.

Ibidem.

In the Caſe of *Byrn* againſt *Yeates*, the Defendant was adjudged in Contempt, for diſtraining Lands, ſet by the Officer, by Order of Court, though he was not ſerved

ſerved with the Order; but confeſſed that he had heard of ſuch an Order by a flying Report.

In Caſes of Contempt, previous Notice is not neceſſary; but the Court generally, unleſs the Offence is flagrant, make a conditional Order; and if the Motion is made, the laſt of the Term, the Court ſeldom grant an Attachment *abſque*.

On Contempt, Notice of Motion not neceſſary; but the Order for the Attachment is generally conditional.

By the 57th general Rule, when Oath ſhall be made of a Miſdemeanour in beating or abuſing the Party, upon ſervice of the Proceſs or Order of the Court, the Party offending is upon Motion to be committed, 'till the Court ſhall order, upon the Nature of the Offence to diſcharge him: And when Affidavit ſhall be made, by two Perſons, of ſcandalous or contemptuous Words againſt the Court, or the Proceſs thereof; the Perſons offending, ſhall likewiſe ſtand committed, upon Motion, without any further Examination; and a ſingle Affidavit in ſuch Caſe, ſhall be ſufficient, whereupon to ground an Attachment; and thereupon, ſuch Perſon ſhall be brought in to be examined: And if the Miſdemeanour ſhall be confeſſed, or proved againſt him, he ſhall ſtand committed, until he ſhall ſatisfy the Court, touching his ſaid Miſdemeanour, and pay the Proſecutor his Coſt: And if he ſhall not thereof be found guilty,

RULE. The Proceedings where ſcandalous or contemptuous Words, are ſpoken againſt the Court.

guilty, ſave by the Oath of the Party who made ſuch Affidavit, he ſhall be diſcharged without any Coſts, in reſpect of the Oath made againſt him as aforeſaid.

The Court will juſtify their Honour and Authority.

So that where any Perſon is aſſaulted, or abuſed in the Service of the Proceſs of the Court, the Court will protect him therein; and it is conceived, that in this Caſe, the Oath of the Party is ſufficient to ground an Attachment on, or a Commitment againſt the Offender, without any Notice to be given him; for who is to prove the Abuſe, but the Party abuſed, he may attend the Court, and ſhew the very Wounds he hath received: And this Abuſe is often committed in ſo private a manner, that there is no way left to prove it, but the Oath of the Party; and if this ſhould be diſcouraged, no Proceſs of the Court will ever be ſerved, and the Court will juſtify their own Honour, and Authority in this Particular.

Party juſtifying, to appear, and pay the Coſt of the Attachment, and to anſwer the Interrogatories in Cuſtody.

In Caſe the Party intends to juſtify himſelf, before he ſhall be admitted ſo to do, he muſt appear as upon an Attachment, and muſt pay the Coſt of the Attachment; and then perſonal Interrogatories are to be exhibited againſt him, and he ſhall be obliged to anſwer in Cuſtody.

By

RULE. Interrogatories on Contempt, not to extend farther than the Affidavit or Order.

By the 58th general Rule, on proſecution of a Contempt for Breach of an Order, or otherwiſe, grounded on an Affidavit, the Interrogatories ſhall not extend to any Matter not comprehended in the Order or Affidavit.

Appearance, how to be.

The Appearances upon theſe Contempts are to be in open Court, that is the Attorney for the Party in Contempt informs the Court, that the Defendant conſents to appear, as upon an Attachment, and prays that the Proſecutor may exhibit his Interrogatories againſt the Defendant or Party in Contempt, and theſe Interrogatories are to be entered in the Chief Remembrancer's Office, and then to be lodged with one of the Examiners, who is to get the Party ſworn before a Baron, and is to examine him thereon.

Attachment in what Caſes directed to the Purſuivant.

For all Miſdemeanours, diſreſpectful Words, or Miſbehaviour to the Court, and for all ſpecial Contempts whatſoever, the Attachment is always directed to the Purſuivant attending the Court: And where the Attachment iſſues, by Order of the Court, it is generally directed to the Purſuivant, by the Order.

RULE. Notice of Appearance to be given.

By the 54th general Rule, where the Party ſhall be brought in by Proceſs, or appearance *gratis*, to be examined upon

upon Contempts, he ſhall give Notice of his Appearance to the Attorney on the other ſide; and if in four Days after ſuch Notice, and Appearance, Interrogatories ſhall not be exhibited to examine him upon, or if examined, and no Contempt thereby proved, nor Commiſſion taken out, nor Witneſſes examined, to prove the Contempt, within four Days after ſuch Examination; the Party examined, is upon Motion, to be diſcharged, if the Court ſee not good reaſon to detain him, and Coſts taxed, if the Court upon Application ſhall ſo adjudge it; but if after Appearance, and Interrogatories exhibited, he ſhall depart before he be examined, without Leave of the Court, an Attachment is to iſſue againſt him, and to ſtand committed, and not to be diſcharged until he be examined, and cleared of his Contempt; and if found in Contempt, to pay Coſts for ſuch his Contempt in departing (after he had appeared) without Leave as aforeſaid.

Interrogatories to be exhibited in four Days after Appearance.

The Party in Contempt, in what Caſe diſcharged.

How puniſhed, if he departs before he be examined, without Leave of the Court.

RULE. How to proceed to prove the Contempt, if the Party proſecuted denies it.

And by the 55th general Rule, where the Party examined, denies the Contempt, the Proſecutor may of courſe take out a Commiſſion to prove it; and by this Rule, the Party proſecuted is to Name but one Commiſſioner, to be preſent at the Execution thereof; and may croſs examine the Witneſſes, but not to examine

examine any of his own Part, without Leave of the Court, by ſpecial Order.*

When the Party proſecuted, appears upon the Attachment, and hath anſwered the perſonal Interrogatories fully; and that the Time for excepting thereto is out, and no Exceptions filed, the Method is, to inform the Court, that the Anſwer is filed, and that the Time for excepting is out, and no Exceptions filed, and that the Defendant, or the Party charged with the Contempt, apprehends that the Anſwer is full, and to move, that the oppoſite Party may examine Witneſſes, if any he hath, to prove the Contempt; or that it be ſet down to be heard on the perſonal Interrogatories, and Anſwer.

How the Party proſecuted, is to proceed, when he hath anſwered the Interrogatories, and no Exceptions filed.

The Time for excepting to Anſwers, to theſe Interrogatories is the ſame, as in Anſwers to Bills.

The Time for excepting.

By

* This is not agreeable to the preſent Practice; for the Party proſecuted, may examine Witneſſes to prove his Anſwer to the Interrogatories, and Commiſſioners Names are returned, and ſettled as in Caſe of Examinations in Chief. See the Practice of the *Chancery*, for the Practice as to theſe Matters, hath never been ſettled in the *Exchequer*. See 1 *Vern.* 187. *Moſeley's Rep.* 312. and note, the Attorney for the Proſecutor is to move the Court for an Order for the Commiſſion, to prove the Contempt. See the Proceedings on *Poſſeſſory Bills*.

RULE Commiſſions to examine Perſons in Contempt; in what Caſes granted.

By the 56th general Rule, in Caſe of a Contempt proſecuted againſt one, who by reaſon of Age, Sickneſs, or other Cauſe, is diſabled to travel; or if againſt any who are Servants or Workmen, and live far off; the Court, upon Affidavit thereof, and upon Motion of Council, and Notice given, will grant a Commiſſion, to examine them in the Country, which is to be at the Charge of the Party deſiring it.

The Courts ſuffer Perſons to be examined on Interrogatories, to purge themſelves of a Contempt, but never to bring themſelves into a Contempt.

The Court will not ſuffer Perſons to be examined on Interrogatories, to bring themſelves into a Contempt; but where a Contempt is expreſly ſworn againſt them; the Court will give them Leave to be examined on perſonal Interrogatories by way of Purgation, in order to clear themſelves. *Moſeley's Rep.* 250.

The Cauſe to be ſet down to be heard on the Examinations.

If when the Party hath fully anſwered, and denied the Contempt, the Plaintiff takes out a Commiſſion to prove it, and the Party complained of joins in the Examination, when the Witneſſes are examined, and the Examination cloſed, upon Motion of the Plaintiff's Attorney, the Cauſe ſhall be ſet down to be heard on the perſonal Interrogatories, Anſwers, and Proofs, and this Order is to be ſerved on the oppoſite Party, and alſo a *Subpœna* to hear Judgment, as on other Hearings.

Hearings. See *Title Hearing*. See *Poſſeſſory Bills*.

A Nobleman, or Peer of the Realm, may abuſe the Party, who ſerves the Proceſs upon him *toties quoties*; for his Perſon being ſacred, the Court from whence the Proceſs iſſues, cannot reach him, or come at him, as they do in the Caſe of a Commoner. This was ſo determined in the Cauſe, *Dean* againſt Lord *Delaware*, where the Party was abuſed in the Service of the Proceſs of the Court, and went without Remedy, *quod fuit durum*. But the Peer may be indicted for the Aſſault, and the injured Party may bring his Action for Damages at Common Law.

If a Peer of the Realm, abuſes a Perſon in the Service of the Proceſs of the Court, the Court can give no Remedy.

But he may be Indicted, or an Action of Damages brought againſt him.

Where a Perſon hath a Bill depending in Court, and falls under the diſpleaſure of the Court, and is ordered to ſtand committed. If when his Cauſe is called on, the other ſide inſiſts he hath not cleared his Contempt, nor ſurrendered himſelf into Cuſtody, he muſt do both theſe Things before his Cauſe can come on to be heard; and it ſhall be ſtruck out of the Paper, and ſhall not be reſtored again, until he hath actually ſurrendered himſelf, and paid the Coſt of the Contempt, and obtained an Order for being diſcharged out of Cuſtody.

A Plaintiff under the diſpleaſure of the Court, and ordered into Cuſtody, his Cauſe ſhall not be heard, until he ſurrenders himſelf, and is diſcharged by the Court.

So

So where a Defendant is ordered into Cuſtody, he muſt ſurrender himſelf, before he ſhall move to be diſcharged, or ſhew Cauſe againſt the Order.

So when a Perſon is ordered to ſtand committed, he ſhall not move to diſcharge, or ſhew Cauſe againſt the Order, until he is in Cuſtody, unleſs he hath Leave by Petition, grounded upon very good and ſtrong Reaſons; he muſt anſwer in *vinculis*: But it is ſaid, that even before he is in Cuſtody, he is in no Caſe to be admitted to ſhew Cauſe, but by ſpecial Leave of the Court.

The Coſts of the Contempts, to be paid before the Contemnor ſhall in any Caſe be heard.

And upon this Head, it is to be obſerved as a general Rule, that the Contemnor who is in Contempt, is never to be heard by Motion, or otherwiſe, until he hath cleared his Contempt, and paid the Coſts. As for Example, if he comes to move for any Thing, or deſires any Favour of the Court; if the other Side ſays or inſiſts he is in Contempt, though it is but to an Attachment for want of an Anſwer; yet even in this Caſe, he is not intitled to be heard, until he hath paid the Coſts of the Attachment, (however ſmall they are) to the Party, or his Attorney, and he muſt produce a Receipt for them in open Court, before he can be heard; and this is always allowed as a good Cauſe, againſt hearing the Contemnor in any Caſe whatſoever.

Which is agreeable to the Practice of the Civil Law.

And this is agreeable to the Practice of the antient Civil Law; but that it was carried farther there againſt the Defendant,

dant, who was contumacious, for he was not only not to be heard in the Cauſe, wherein he was guilty of the Contempt, but was alſo denied to be heard in any other Cauſe, until he had cleared himſelf. *Quarta pœna eſt contra contumacem, quia non auditur niſi refectis Expenſis. Et quinta pœna eſt quia contumaci, poteſt Judex denegare Audientiam, non ſolum in illâ Cauſa in quâ fuit contumax, verum etiam omni alia. Maranth.* 261.

If a Perſon in Contempt for not obeying an Order, may Move to diſcharge it.

But it is ſaid, that in ſome Caſes, the Court will admit a Perſon to move to diſcharge an Order, though in Contempt for not obeying it. See *Moſeley's Rep.* 259.

Of the ſeveral Sorts of Coſts, and how recovered.

The awarding of Coſts, diſcretionary in the Court.

THE awarding of Coſts, is a Matter diſcretionary in the Court, and its Power herein always exerciſed, according to the Circumſtances of the Caſe, and the Litigiouſneſs of either of the Parties.

Four ſorts of Coſts.

There are four Sorts of Coſts, moderate Coſt, taxed Coſt, full Coſt, and exemplary Coſts.

Moderate Coſt. Moderate Coſt, is the fourth Part of the taxed Coſt ſtruck off.

Taxed Coſt. In taxed Coſt the Officer but allows ten Shillings to a Barriſter, and twenty Shillings to a King's Counſel, and but one Counſel upon a Motion, and two upon a Hearing.

Full Coſts. In full Coſts, the Litigant that gains the Sentence, ſhall have ſuch reaſonable Coſt, as he neceſſarily expended; he ſhall be allowed Fees given to four or five Lawyers, and three or four Pounds to each Lawyer, *&c.* but the Plaintiff in this Caſe muſt affirm upon Oath that thoſe Charges were neceſſarily expended by him in the Proſecution of the Suit, and were accordingly paid by him. See the Caſe of *Narl* againſt *O'Hara*, and Sir *Walter Blake* againſt Sir *John Kirwan*, in this Court in 1721. and the Caſe of *Crofton* againſt *Crofton*, in *Chancery*, in 1752.

Exemplary Coſts. Exemplary Coſt, is the higheſt Coſt a Court of Equity gives, and is ſomewhat more than full Coſt. See the Caſe of *Donelly* againſt *Lynch*, in this Court, in 1718.

The Courſe in taxing Coſts. In all Caſes whatſoever, where a Party is entitled to Coſts, either upon Decrees, or Diſmiſſes, or upon any other Order of

of the Court, when the Bill of Coſt is prepared, a Copy of it is to be ſerved on the Attorney for the oppoſite Party, with a Summons to attend the Officer on the Taxing of it: And if he does not attend after Service of two Summonſes, the Officer will proceed *ex Parte* without any Affidavit or Order.

Where the Coſt is of Courſe, and no particular Order for paying it, then the Attorney for the Party entitled to the Coſt, uſually obtains an Order, that the Officer may tax it.

Subpœna for Coſt.

When the Bill of Coſt is taxed, it is to be ſigned by the Chief Baron, and filed; and either Party may have an atteſted Copy thereof: And when it is ſo ſigned and filed, a *Subpœna* may iſſue of Courſe for it.

RULE. Attachments for Coſts on Affidavit of Demand and Non-Payment.

By the 29th General Rule, upon Affidavit filed (grounded on a *Subpœna*) of Demand of Coſts on a Diſmiſs, Contempts, *&c.* and Non-Payment, the Attachment and Order for the ſame to be taken out of Courſe*.

* Inſtead of entering this Rule of Courſe, it is now moved for by an Attorney, upon an Affidavit, which muſt prove a perſonal Demand; and the Perſon, who makes the Demand, muſt have a Letter of Attorney, impowering him to receive the Coſts; and it muſt be ſo ſet forth in the Affidavit.

Affidavit, what to contain, and the Letter of Attorney to receive the Coſts.

But if the Perſon, to be ſerved, abſconds, to avoid a perſonal Demand, and that there is no Poſſi-

How to proceed, if the Party

RULE. In Attachments for Costs, and not performing Decrees, Notice to be taken therein what it is for.

And by the 71st general Rule, In all Attachments, for not performing of Decrees, and for Non-Payment of Costs, particular Notice is to be taken in the Body thereof, what it is for, to the End that the Sheriff may be the more careful and wary in the Execution, or taking Security in such Cases.

Process for Non-payment of Cost may be carried on to a Sequestration.

And this Process, for the Non-Payment of Costs, may be carried on against the Party to a Sequestration: But note, in this Case, the first Attachment is to be directed to the Sheriff, and upon a *Non est inventus* being returned thereon, the Court, on Counsel's Motion, will grant a Serjeant at Arms against the Defendant, without running out the other intervening Process; and upon the like Return upon the Serjeant at Arms, and upon Counsel's Motion, they will grant a Sequestration.

Costs to be paid personally, how to be recovered.

As to Costs, wherever the Court decrees the Party to pay Costs personally, in that Case the Officer taxes them, and the Party to whom the Costs are awarded, proceeds by *Subpœna*, and Attachment for Recovery thereof: But where the Court directs, that they shall be paid out of a real or trust Estate, they

absconds to avoid a personal Demand.

Possibility of demanding personally; in such Case, the Court, on Affidavit thereof, and upon a Counsel's Motion, without Notice, will order, that an inferior Service, or a Service or Demand in the common Way, shall be sufficient.

they muſt follow ſuch Eſtate, and not the Perſon of the Party.

And how if payable out of a real, or Truſt Eſtate.

If the Eſtate be ſold, the Coſt is uſually paid out of the Purchaſe Money; if the Profits be in the Receiver's Hands; or if the Party who is to pay them, has ſufficient Profits in his Hands, the Court will direct him to pay them thereout, or direct the Officer to enquire whether there be ſufficient for the Purpoſe, or not.

How if the Eſtate be ſold.

If the Eſtate be in a Receiver's Hands, or the Party's own Hands.

No Exceptions will be allowed to the Officer's Report on taxing Coſts; but if he allows ſuch Coſts, as ought not to be allowed, or are not allowable by Law, the Party aggrieved may apply to the Court by Counſel, and on ſuch Motion, the Court will examine into the ſame; but Notice is to be given thereof to the oppoſite Party.

No Exceptions to the Officer's Report on taxing Coſt, but the Party aggrieved ſhall be heard by Counſel.

Who ſhall pay Coſts, and in what Caſes, Coſts ſhall be paid.

THE Expence either Party is put to, by the Delays, Contempts, *&c.* of the other, are only remitted or purged by the Payment of Coſts, unleſs the Court order otherwiſe.

Delays or Contempts only purged by Coſts.

RULE. Coſt on Decree or Diſmiſs, tho' not aſcertained by the Court.

And by the 66th general Rule, in all Cauſes wherein a Decree, or Diſmiſs, is pronounced upon full Hearing, if no Coſts be aſcertained by the Court, or mentioned at the Time of pronouncing thereof; yet the Party for whom the Decree is given, may make up his Bill of Coſts to be taxed of Courſe. See the Proceedings on drawing up Decrees, *&c. Title Decree, &c.*

Who are exempt from Coſts.

But Executors, Guardians, and Truſtees, are uſually exempt from Coſts in Equity, or awarded Coſts out of the Eſtates in their Hands, unleſs they have greatly miſbehaved themſelves; alſo an Heir at Law, is in moſt Caſes exempt from paying Coſts. *Ba. Eq. Ca.* 125. 1 *Bac. Abr.* 517.

Not an Adminiſtrator Plaintiff.

But an Adminiſtrator Plaintiff pays Coſts in Equity, and ſo determined *per totam Curiam*, on a Demurrer to the Plaintiff's Bill allowed. *Bunb. Rep.* 63.

Defendant Executors pay no Coſts in Equity.

If an Executor is Defendant in Equity, and there is a Decree againſt him, yet he ſhall not pay Coſts, though an Executor Defendant at Law pays Coſts in all Caſes; for he cannot plead it at Law in Excuſe of Aſſets. *Hard.* 165. *Sed quær.* if there be no probable Cauſe of conteſting, or if he hath Aſſets

in

in his Hands, more than ſufficient to pay Debts and Legacies.

A Solicitor proſecuted a Suit in the Name of a Stranger, who not being to be found, the Maſter of the Rolls declared, that if there were one Precedent in the Caſe, he would make another, and order the Solicitor to pay Coſts. 1 *Ch. Ca.* 71.

A Solicitor compelled to pay Coſts not producing his Client.

A. Brought a Bill in *Forma Pauperis*, to which the Defendant put in a Plea, and Demurrer, which were both overruled, and it was inſiſted upon, that he ſhould have no Coſts, being at none; but my Lord *Somers*, after long Debate, and Enquiry of all the antient Counſel and Clerks, (who agreed that he ſhould have Coſts,) ordered him his Coſts, like other Suitors; for though he is at no Coſts, or but ſmall Coſts; yet the Counſel, and Clerks do not give their Labour to the Defendant, but to the *Pauper*. *Paſch.* 1701. between *Scatchmer* and *Foulkard*, *Bac. Eq. Ca.* 125. *Sed vide* Precedents in *Ch.* 119. *e contra.*

A *Pauper* who recovers, whether he ſhall have full Coſts or *Pauper* Coſts.

If a Bill be brought to call a Truſtee to an Account, and he by Anſwer ſubmits readily to it, though on the Account he be found in Debt; yet he ſhall pay Intereſt for the Balance only, from the Time of the Account liquidated, and

Truſtees when to pay Coſts.

no Coſts, if he has not miſbehaved himſelf. *Hill.* 1705. between *Parrot* and *Treby*, *Bac. Eq. Ca.* 125.

New Trial granted, only on Payment of Coſts.

If a new Trial, or a ſecond Iſſue be directed, it is to be upon Payment of Coſts. 2 *Vern.* 75.

Demurrer by Commiſſion without Anſwer allowed, but no Coſts.

A Demurrer was allowed, but without Coſts, becauſe it came in by Commiſſion without any Anſwer. 1 *Vern.* 282.

Coſts of the whole Suit, except Bill of Revivor, though abated by Party's own Fault.

In the Caſe of *Dunbain* and *Knight*, 1 *Vern.* 318. *Paſch.* 1585. a *Feme Sole* exhibited a Bill, and, pending the Suit, married, and the Baron and Feme brought a Bill of Revivor, and obtained a Decree with Coſts, and the Court ſaid it ſhould be the Coſts of the whole Suit, excepting the bare Charge of the Bill of Revivor, although it was objected that the Abatement was the Party's own Act: And that if the Defendant had been in the right, and ſo to have Coſts, yet he could not have compelled the Plaintiffs to revive.

An Heir, or Executor to anſwer only for their own Time.

And in the above Caſe, the Lord Keeper ſaid, that it was not like a Revivor againſt an Heir, or Executor, where the Suit is abated by Death; in that Caſe, they ſhall anſwer only for their own Time.

If

If a ſecond Mortgagee brings a Bill, to redeem the firſt Mortgagee, who had been put to great Charge in foreclоſing the Mortgagor, the Coſts which the firſt Mortgagee has been at, ſhall not be taxed as in Caſe of an adverſary Suit, but he ſhall be allowed all his Coſts and Charges, (as is done in Caſe of a Solicitor who lays out Money for his Client,) and the Profits of the mortgaged Premiſſes ſhall be firſt applied to pay off theſe Coſts, before it goes to ſink the Principal. Decreed, *Mich.* 1690; between *Lomax* and *Hide.* 2 *Vern.* 185.

A ſecond Mortgagee who foreclоſes the firſt, ſhall have full Coſts againſt the Mortgagor.

A Solicitor in a Suit for Money laid out, &c. ſhall have more than taxed Coſt.

A Bill of Exchange was obtained by Fraud and ill Practice, and the Court declaring it a groſs Fraud, ordered the Party Coſts to be aſcertained by his Oath. 2. *Vern.* 123.

A Party guilty of a groſs Fraud to pay Coſts aſcertained by Oath.

An Heir at Law, or even an Heir Male to the Honour of the Family, if there be probable Cauſe to contend for the Family Eſtate, ſhall not pay Coſts. 1 *Williams*, 482. And in the Caſe of *Bidulph* againſt *Bidulph*, on a Bill by a Deviſee againſt an Heir, to prove a Will, the Heir croſs examines the Plaintiff's Witneſſes, and refuſes to releaſe his Right, yet the Heir ſhall have his Coſts given him, on Motion; otherwiſe, if he examines Witneſſes of his own. 2 *Williams*, 284.

Heir at Law ſhall not pay Coſt, if there be probable Cauſe to contend for the Eſtate, otherwiſe if he examines Witneſſes of his own.

If

Attorney or Solicitor in what Caſe to pay Coſts.

If an Attorney or Solicitor ſhall appear to be guilty of a groſs Neglect, the Court will order him to pay the Coſts. *Ibidem*, 593.

A Legatee or Creditor coming in before the Maſter ſhall have Coſts.

A Legatee or Creditor, coming in before the Maſter, and not Party to the Cauſe, ſhall have his Coſts; for it was in his Power to have brough a Bill for his Legacy, or Debt, which would have put the Eſtate to further Charge. 2 *Williams*, 27.

The Court of *Chancery* will give Coſts for not going to Trial, on an Iſſue directed.

If an Iſſue out of *Chancery* be directed to be tried, and the Party Plaintiff in the Iſſue gives Notice of Trial, and does not countermand it in Time; upon Motion, the Court of *Chancery* will give Coſts, and not put the Defendant to move the Court of Law, where the Iſſue is to be tried. *Ibidem*, 68.

An Infant or his *prochein Amy* may be ſued for Coſt on a Diſmiſs.

If an Infant brings a Bill by his *prochein Amy*, but never ſtirs in it after he comes of Age, and the Bill is diſmiſſed, the Defendant may at his Election ſue the Infant, or *prochein Amy* for ſuch Coſts; if the Infant be ſued, and pay the Coſt, he may take his Remedy over againſt the *prochein Amy*; for at Law, an Infant is liable to pay Coſts, if the Judgment be againſt him; and if the Common Law be ſo, why ſhould

it

it not be ſo in Equity, otherwiſe an Infant would be left at Liberty to plague Mankind as he thinks fit. 2 *Williams*, 297, 298.

On a Bill of Partition neither ſides ſhall pay Coſts, it being for the Benefit of both Parties to have their Share in ſeveralty. *Ibidem.* 337.

On a Bill of Partition neither Party pays Coſt.

For the Coſt to be paid, if the Plaintiff's Bill be diſmiſſed before Hearing, for want of a Replication, ſee *Title Replication.*

Coſt on a Diſmiſs for Want of a Replication.

Formerly, if the Plaintiff after Anſwer, but before Hearing, diſmiſſed his own Bill, he was to pay the Defendant but twenty Shillings Coſt; and eſpecially, if the Bill was but for Diſcovery only; but now the Court on Application of the Defendant's Attorney, will direct the Coſt to be taxed by the Officer, and that the Plaintiff ſhall pay this Coſt to the Defendant, and this ſeems moſt reaſonable; for, the very Copy of the Bill might coſt three Times the Sum of twenty Shillings, beſides the Fees to Counſel and Attorney.

The Coſt the Plaintiff is to pay if he diſmiſſes his own Bill before Hearing.

Upon a Motion to diſmiſs a Bill, wherein the Plaintiff had proceeded to an Anſwer only, with twenty Shillings Coſts; *per* Lord Keeper, that was a Rule made at leaſt fifty Years ago; and there

Ibidem.

is

is no Reaſon if a Defendant has been put to greater Charge, why he ſhould not have the Coſts he has been put to, and that for the future, it ſhould be referred to a Maſter to tax Coſts in ſuch Caſes. 1 *Vern.* 116. *Hillary* 1682. *Anonimus*, and ſame Book, 334.

Officer of the Court, and his Executor, liable to Coſts by his Neglect in his Duty, if he has received his Fee.

If a Suitor hath paid the Officer his Fee, and the Officer hath neglected his Duty in entering ſome of the Proceſs of Contempt, by which Means, the Proceſs becomes irregular, the Suitor is to pay the Coſts, but he to have them over againſt the Officer; and though the Officer in ſuch Caſe die, yet this being a Duty, and matter of Contract, his Executor ſhall pay them out of the Aſſets. 2 *Williams* 658.

If the Plaintiff lives in another Kingdom, he muſt give Security to pay Coſts.

If a Plaintiff ſets forth in his Bill, that he reſides in another Kingdom; or upon Affidavit of his being a Foreigner, or living abroad, the Court on Motion of the Defendant's Attorney, will make an Order, that the Plaintiff do give Security to pay the Coſts, before the Defendant be obliged to anſwer his Bill. *Moſeley's Rep.* 7. And in the Caſe of *Kerr*, againſt the Dutcheſs of *Munſter*, *Bunb. Rep.* 35. the Court refuſed to permit a Depoſit in Money, in Stead thereof.

And a Depoſit in Money, inſtead thereof, not permitted.

Defendant after Demurrer filed, may amend,

The Defendant may amend his Bill, paying common Coſts, after the Demur-

rer

rer is put in, but after it is ſet down to be argued, he muſt pay the Coſts of the Demurrer. *Moſeley's Rep.* 301.

paying common Coſts; but after ſet down, to pay Coſts of Demurrer.

On a Report of Aſſets, in the Hands of an Executor or Adminiſtrator ſufficient to Anſwer the Plaintiff's Demand, Coſts were decreed generally, againſt the Defendant, without directing an Inquiry of Aſſets. *Moſeley's Rep.* 204. *Davey* againſt *Seys.*

On a Report of Aſſets, Coſts are decreed, generally againſt a Defendant, and not out of the Aſſets.

When by Order of this Court, Proceedings are had at Law, to try the Iſſue, or the like; the Plaintiff ſhall have his Coſts at Law allowed, as well as his Coſts in this Court.

Coſts at Law, as well as in this Court, on a leading Order.

By the 43d general Rule, all Pleas, Demurrers, and Exceptions to Reports, are to be ſet down to be argued by the Attorney concerned, within four Days after filing thereof: Now, if the Plaintiff allows the Plea, or Demurrer, or if the Exceptions to the Report be allowed within theſe four Days, without putting the oppoſite Party to Expence, the Coſt is but twenty Shillings.

The Coſt on allowing a Plea, or Demurrer, or Exceptions to Reports, within the four Days, in which they are to be ſet down to be argued.

By the 25th general Rule, if the Defendant allows the Exceptions, and anſwers over, or gets Time to anſwer, before the Order of Reference to one of the Barons, and the Summons are taken out, he is to pay but twenty Shillings Coſt; but after the Order and Summons are

RULE.
The Coſt to be paid by the Defendant, on allowing Exceptions before and after the Order of Reference and Summons are taken out.

are taken out, he is to pay forty Shillings Coſt, though it be before Report, in which ten Shillings, the Baron's Fee, on the Report is included.

No Coſt if Plaintiff prays Time to except, and Exceptions are allowed, before Order to refer is taken out.

But if the Plaintiff prays Time to except, and the Defendant allows the Exceptions before the Order of Reference is taken out, he ſhall pay no Coſts.

Coſts to be paid by the Defendant on ſhort Anſwers, and by the Plaintiff if the Anſwer be reported full.

And by the 30th general Rule, if the Anſwer be reported ſhort, the Coſt to be paid by the Defendant is but forty Shillings, and upon a ſecond ſhort Anſwer three Pounds, and upon a third four Pounds, (for which Attachments, and other Proceſs, of Contempt may iſſue of courſe) and then to be committed until he anſwers fully to perſonal Interrogatories, and enters into Recognizance to perform the Decree, if the Plaintiff prays the ſame; ſo, if the Anſwer be reported full, and ſufficient, then the Plaintiff is to pay forty Shillings Coſt to the Defendant in two Days after the Report.

Coſt to be lodged in excepting to the Baron's Report.

For the Coſt to be depoſited on excepting to a Baron's Report, on Exceptions to Anſwers, ſee *Title Exceptions to Anſwers.*

The Coſts to be paid by the Plaintiff for not appearing on the Hearing; as alſo, where the Cauſe

The Coſts to be paid by the Plaintiff for not appearing upon the Hearing, after Service of *Subpœna*, to hear Judgment, is three Pounds five Shillings, if

a

a King's Counſel be employed; and two Pounds five Shillings, if a common Counſel be employed; and according to the general Practice, if there be ſeveral Defendants, but the one Coſt is to be paid among them all, though they have different Intereſts, and appear by different Attornies, which ſeems extremely hard and againſt all Reaſon and Juſtice. And the ſame Coſt is to be paid by the Plaintiff, where the Cauſe is ordered to ſtand over on a Demurrer at the Hearing for want of Parties, and on a Plea of Outlawry, at the Hearing.

is ordered to ſtand over on a Demurrer at the Hearing, for Want of Parties, or on a Plea of Outlawry.

Where a Cauſe is brought on by the Plaintiff on Bill and Anſwer, and he obtains a Decree, he ſhall have his Coſt to be taxed by the Officer of the Court.

Plaintiff to have taxed Coſt on Decree for him on Bill and Anſwer.

By the 48th general Rule, if the Plaintiff brings a Cauſe to a Hearing upon Bill and Anſwer, and the Court finds no Ground to Decree thereon, the Bill is to be diſmiſſed with Coſts; or the Plaintiff, if he deſires it, may be admitted to reply, he firſt paying the Defendant or his Attorney, forty Shillings Coſt * to be paid in four Days after the Hearing, or the Diſmiſs is to ſtand.

But if the Court cannot Decree thereon, the Bill is to be diſmiſſed with Coſts, or Plaintiff may reply firſt, paying forty Shillings Coſt.

For

* The ſmall Coſt the Plaintiff is to pay in this Caſe, is often a great Grievance: But there does not appear any the leaſt Reaſon, why this Coſt ſhould be

Coſts to be paid by the Defendant, when let in to ſhew Cauſe againſt a conditional Decree.

For the Coſts to be paid by the Defendant, on being let in to ſhew Cauſe againſt a conditional Decree, ſee the Proceedings on conditional Decrees. *Tit. Decree, &c.*

And to anſwer where a Bill has been taken, as confeſſed.

And for the Coſts to be paid by the Defendant, on being let in to anſwer after a Decree to have the Bill taken as confeſſed, ſee the Proceedings on Bills taken as confeſſed, *Title Hearing.*

The Coſts where two Bills in Equity, are for the ſame Matter, and upon Elections, to proceed at Law or in Equity.

For the Coſts to be paid when two Bills in Equity are brought for the ſame Matter, or upon Elections to proceed at Law, or in Equity, where the Suit at Law, and the Suit in Equity, are for one, and the ſame Demand, ſee Pa. 236, to 241. *Title Bills.*

Coſts

be leſs than the Coſt the Plaintiff is to pay for not appearing on the Hearing, which alſo, is extremely ſmall, and in general, may not be the tenth Part of what the Defendant hath really, and neceſſarily expended. But Matters of Coſt (as has been ſaid before) are diſcretionary in Courts, who of late Years do much conſider the Circumſtance of the Caſe. The antient ſtated Sums for Coſts, in certain Caſes, might have been juſt and proper Allowances at the Times they were fixed, but would at this Day, from the great Changes which have happened in Things in every degree, be very far ſhort of reaſonable Compenſation. See the Caſe of *Vipond* and *Rowley*, in this Court, *Eaſter* Term, 1759.

Coſts are not always to follow the Event of the Cauſe, as where the Money was found due to the Defendant upon Account; yet it appearing to be much leſs, than had been claimed by the Defendant's Anſwer; in that Caſe, the Defendant was allowed no Coſts. 1 *Williams* 376.

Coſts not always to follow the Event of the Cauſe.

If a Defendant puts in a ſecond Anſwer, Coſts are thereupon due to the Plaintiff; and though the Plaintiff accepts a third Anſwer from the Defendant, he doth not thereby waive his Title to his Coſts, on the ſecond Anſwer, but may take out a *Subpœna* for them. *Bunb. Rep.* 34.

Plaintiff accepting a third Anſwer, before he receives Coſts, for a ſecond does not waive them.

Although there may be no Revivor of a Diſmiſs with Coſts, or of a Decree for Coſts only, not aſcertained; yet there may be for the Duty and Coſts; and in this Caſe, an Executor ſhall pay Coſts. *Bunb. Rep.* 45. 160. 332. *Select Ca.* in *Chan.* 21. 54.

Bill of Revivor by an Executor, for the Duty and Coſts, he ſhall pay Coſts.

Wherever a Bill is for a Diſcovery only, and the Plaintiff has a Diſcovery by the Defendant's Anſwer, the Plaintiff cannot reply or proceed; for by the Diſcovery, the Plaintiff has obtained the End of his Bill; and when he has had the Benefit of it in an Action brought at Law, and comes after to Diſmiſs his Bill (which he muſt do, or the Defendant will,) ſuch

On a Bill of Diſcovery, only, the Plaintiff ſhall pay Coſts, tho' he has a Diſcovery; and the Defendant was the occaſion of the Bill.

Diſmiſſion will be with Coſts to be taxed; which ſeems hard, ſince the Defendant was the occaſion of this Bill, by his falſe Plea below; and the Plaintiff there can be allowed no Coſts in Equity. *Bunb. Rep.* 124.

A Defendant puts in two ſhort Anſwers, then Plaintiff amends, Defendant again anſwers ſhort, he ſhall pay Coſt, as upon a third inſufficient Anſwer.

In the Caſe of *Harman* againſt *Immins*, *Bunb. Rep.* 203. Exceptions allowed to two Anſwers to the original Bill; and then the Plaintiff amended his Bill (as he might do with Coſts) the Defendant put in his Anſwer to the amended Bill, and the Plaintiff ſet down the Exceptions (with ſome few Additions) to that Anſwer, and they were allowed; and the Queſtion was, if the Defendant ſhould pay Coſts, as upon a third inſufficient Anſwer, or only as upon a firſt inſufficient Anſwer to the amended Bill: And *per Curiam*, it was determined, he ſhould pay Coſts, as on a third inſufficient Anſwer.

Decrees and Diſmiſſes.

The Sentence at the Civil Law, and in Equity.

IT has been already ſhewn, in treating on Bills of Review, that the Sentences by the Civil and Canon Law, are two-fold, interlocutory and definitive; and that the interlocutory, are any Orders pronounced by the Judge, in the Cauſe touching the Proceedings, before they came

came to a definitive Sentence: And thus in Courts of Equity, all Orders are either interlocutory, or final and definitive; interlocutory, until they come to the definitive Sentence; for all Preparations in the Cauſe before, are but interlocutory.

All Orders are either Interlocutory, or final and definitive.

And theſe interlocutory Orders are made by the Court, either upon ſome incidental intervening Queſtion, ariſing upon the principal Point in the Progreſs of the Cauſe; or where the Court doubts of any Fact, and an Iſſue is directed at Law to try it; or where the Court have determined the Right, as to the principal Point in Queſtion, but yet leave ſomething further to be done to compleat the Sentence; as where the Order, or Decree is given for the Thing demanded, but a *quantum dampnificatus* directed to aſcertain the Damages; or a Reference to an Officer to report the Sum due; which laſt brings on the Matter of Account before treated of.

Interlocutory Orders in what Caſes.

The Decree or Sentence is final and definitive, when the whole Matter in Controverſy is, upon a full Hearing, abſolutely determined; and that is, either where a Duty is decreed, or a Sum certain; or where there has been a Decree to an Account, and the Account ſettled, and the Sum due decreed

The definitive Sentence.

upon a full Hearing, on the Officer's Report and the Merits, and the Decree made up and ſigned by the Court and enrolled: For note, that until the Decree be ſo ſigned and enrolled, it is deemed but an interlocutory Order, and may be altered by Re-hearing, and ſometimes by Motion.

Decree in Favour of Plaintiff.

And theſe Decrees are given, either in favour of the Plaintiff, or of the Defendant, and Decrees in favour of the Plaintiff are given.

Upon Confeſſion expreſſed or implied.

Firſt, Upon Confeſſion; and there are two Caſes, in which an implied Confeſſion is ſufficient ground for a Decree.

Implied Confeſſion in two Caſes.

Firſt, When a Man being ſerved with Proceſs to appear, neglects to appear thereto.

Secondly, Where a Perſon appears, and departs without anſwering.

Proceſs to a Sequeſtration and Bill taken *pro confeſſo*.

In either Caſe, when the whole Proceſs of the Court is ſpent againſt him to a Sequeſtration, the Bill ſhall be taken as confeſſed; becauſe it is preſumed to be true, as the Defendant had full Notice, and Opportunity to make Defence againſt it, but did not. See *Title Hearings, on Bills taken pro confeſſo.*

Secondly, On Defendant's neglecting to appear on the Hearing.

Secondly, Where a Defendant hath been ſerved with a *Subpœna* to hear Judgment,

Judgemnt, and neglects to appear upon the Hearing. See Page(396, *&c.*) the Proceedings on conditional Decree.

Thirdly, On the Merits of the Caſe, where the Plaintiff hath Equity ſufficient to eſtabliſh his Demand. — Thirdly, On the Merits of the Caſe.

Secondly, Decrees in Favour of the Defendant, and they are given. — Decree in favour of the Defendant.

Firſt, Upon the Plaintiff's failing to proſecute his Suit, which happens in three Caſes: Firſt, Where the Defendant hath anſwered the Plaintiff's Bill, and the Plaintiff neglects to reply thereto, in the Time allowed to him by the Rule for replying. — Firſt, On Plaintiff's neglecting to proſecute his Suit.

Secondly, Where the Plaintiff hath replied, but after Replication neglects to proſecute further, the Defendant may rejoin, and his Attorney may put a Rule on the Plaintiff to examine his Witneſſes the next Vacation, or the Cauſe to be heard the next Term, on the Pleadings, and on default thereof, the Defendant may ſet down the Cauſe and proceed to Hearing; but note, the Defendant cannot put this Rule on the Plaintiff, until he hath let a Vacation paſs without Examining, and the ſhort Vacation after *Eaſter* Term, is never accounted a Vacation for examining in. — By his neglecting to reply in Time. — Or after Replication neglects to proceed.

On the Defendant's bringing on the Cauſe to a Hearing on the Plaintiff's neglect and the Plaintiff not appearing.

Thirdly, Where Witneſſes have been examined, and Publication paſſed, and the Defendant, on the Plaintiff's neglect, brings the Cauſe to a Hearing; if the Plaintiff doth not appear at the Day of Hearing, the Court will, on Motion of the Defendant's Counſel, order a Diſmiſs with Coſt, which Coſt is taxed according to the Proceedings in the Cauſe.

Secondly, On Plea or Demurrer allowed.

Secondly, Where a Plea or Demurrer is put into the Bill, and the Plea allowed and proved, and the Demurrer allowed, the Bill is to be diſmiſſed.

Thirdly, On the Merits of the Cauſe.

And Thirdly, On the Merits of the Cauſe upon the Hearing. See the Proceedings on Hearing *ad Requiſitionem defendentis*, *Title Hearing*.

Equity will not decree an Award, unleſs it be of all Matters referred.

Equity will not decree an Award, unleſs it be of all Matters referred. 1 *Cha. Ca.* 186.

A ſingle Witneſs againſt a Defendant's Anſwer not ſufficient to ground a Decree on.

Nor will the Court direct a Trial at Law.

Where there is but a ſingle Witneſs againſt the Defendant's Oath, this is not ſufficient Evidence to decree againſt the Defendant; and in this Caſe, as the Plaintiff has had the Benefit of the Defendant's Oath, the Court will not ſend it to be tried at Law, where one Witneſs is ſufficient. 1 *Vern.* 161. 2 *Vern.* 283.

But

But though this be a Rule of Equity, it is ſaid it has been diſpenſed with, where a Fraud was plain and conſiderable. *Ayl.* 69. See *Title, Witneſſes, Evidence*, &c. Unleſs the Fraud be plain and conſiderable.

Of Diſmiſſes; and in what Caſes they ſhall be obtained.

A Diſmiſs is the Sentence of the Court, whereby the Plaintiff's Bill is ordered to ſtand diſmiſſed, and is alledged unfit for the Court to take Cognizance of; alſo it may be in many Caſes, where the Court hath Cognizance of the Cauſe, yet finds no Equity proper for the Plaintiff's Relief, and therefore diſmiſſes the Bill. Diſmiſs what.

And Diſmiſſes are uſually prayed and procured upon Motion, and had upon the Defendant's Anſwer and Diſclaimer, and ſometimes on a Plea, or Demurrer, or on the Merits at the Hearing. Diſmiſſes how procured, and in what Caſes.

A Diſmiſs upon Hearing is ſometimes for want of Parties; ſometimes, becauſe the Matter belongs to another Court to determine, as the Courts of Law, and Eccleſiaſtical Courts; or, for that the Matter in Demand is below the Dignity of this Court, either in reſpect Diſmiſs upon Hearing in what Caſes.

ſpect of it's Value, as under ten Pounds; or where the Matter of the Bill is ſuch, for which there ought to be no Relief, as agreements at Play, or Wagers, Bargains for Offices againſt the Statute of *Edward* the 6th. or upon Contracts for Simony, or Uſury, or where it appears that the Plaintiff hath no Equity in his Bill.

RULE 49, Diſmiſs with Coſts on Hearing *ad Requiſition. defendentis.*

By the 49th. General Rule, where Witneſſes have been examined, and Publication paſſed, and the Plaintiff delays the Proſecution, or is negligent to procure a Hearing, the Defendant may, if he will, procure the Cauſe to be ſet down for Hearing, and ſerve the Plaintiff with Proceſs *ad audiendum Judicium*; at which day, if the Plaintiff will appear, he may proceed to Hearing, but if he will not, the Defendant may be diſmiſſed with Coſts, and left at Liberty, if there were an Injunction, or Order to reſtrain him.

But not until after two Terms after Publication.

Note, the Plaintiff hath two Terms after Publication to ſet down the Cauſe for Hearing, before it ſhall be ſet down at the requeſt of the Defendant.

On a Diſmiſs where there are ſeveral Defendants, who defend by different Attornies, Coſt is to be paid to each.

And it is ſaid, that upon all theſe Diſmiſſes, if there be ſeveral Defendants, who defend the Suit ſeverally by different Attorneys, Coſts of Diſmiſſion muſt be paid to as many Defendants as have appeared by different Attornies.

But

But if the Plaintiff ſets down the Cauſe, and ſerves a *Subpœna* to hear Judgment; if the Defendant is ready and appears, and the Plaintiff is not ready, the Court cannot diſmiſs the Bill, but will, on Motion of the Defendant's Counſel, ſtrike the Cauſe out of the Paper, and order that the Plaintiff ſhall not bring on the Cauſe again, untill the Coſt of that Day's Attendance being three Pounds five Shillings, if a King's Counſel be employed; and two Pounds five Shillings, if a common Counſel, or more, if the Court think fit to order it, be paid to the Defendant. An Inſtance of this, in the Cauſe of *Glaſcot* and *Glaſcot*, in this Court in 1719, though the Plaintiff was a *Pauper*. But in this Caſe, the Defendant muſt prove the Service of the *Subpœna* to hear Judgment; and this Service may be proved either by the Affidavit of the Party, or of him to whom it was given, and it muſt be filed before it can be read, but the common Coſt of two Pounds five Shillings, or three Pounds five Shillings, if a King's Counſel be employed, is ſeldom exceeded; and if there be ſeveral Defendants who have different Intereſts, and appear by different Attornies, yet, according to the general Practice, but the one Coſt, either two Pounds five Shillings, or three Pounds five Shillings, (as aforeſaid) is to be paid

But if the Plaintiff ſets down the Cauſe, and ſerves *Subpœna* to hear Judgment, and appears not on the Hearing, the Bill cannot be diſmiſſed, the Cauſe is to be ſtruck out of the Paper; and not to be brought on again, till the Coſts be paid.

Defendant to prove that he was ſerved with *Subpœna* to hear Judgment.

And in this Caſe but one Coſt is to be paid though there be ſeveral Defendants who defend by different Attornies.

paid by the Plaintiff among the ſeveral Defendants. But ſee before *Title Coſts.*

Diſmiſſion on Hearing not to be altered but by Bill of Review.

As the foundations of Diſmiſſes are different, ſo are alſo the Effects; for if a Diſmiſſion be decreed upon a Hearing, and drawn up and ſigned and enrolled, it may not be altered by any Motion, or Order, but only by Bill of Review: And if a new Bill be filed, whether the Diſmiſſion be enrolled, or in Paper, it may be pleaded in Bar, and will be allowed; but it is ſaid where a Cauſe is diſmiſſed on full Hearing, it may be retained again, or a new Bill admitted, upon a new Matter appearing by Affidavit.

But Diſmiſs for Want of Proſecution, Bill retained on Cauſe ſhewn, and Coſts paid.

But when the Diſmiſs is for want of Proſecution, and not on the Merits, then if Cauſe be ſhewn on Motion, and an Excuſe made for the delay of Proceeding, and on paying Coſts, the Plaintiff's Bill ſhall be retained.

Diſmiſs above a Year, an Order to be obtained to proceed.

In all Caſes, where a Diſmiſs is obtained, and not proceeded on above a Year, an Order muſt be obtained for Liberty to proceed thereon, which the Court will grant on an Attorney's Motion.

If a Bill prays no Relief, it cannot be diſmiſſed on Hearing, the Cauſe muſt be ſtruck out of the Paper.

A Cauſe brought on to a Hearing, where the Bill was for Diſcovery only, the Queſtion was Whether the Bill ſhould be diſmiſſed, or the Cauſe ſtruck out of

of the Paper? and his Honour the Maſter of the Rolls, ordered the Cauſe to be ſtruck out of the Paper; becauſe a Bill is never diſmiſſed where the Plantiff prays no Relief; for the Words of a Diſmiſſion are, 'The Court ſeeing no Cauſe to relieve,' *&c. Moſely's Rep.* 185.

Diſmiſſion on an Election to proceed here or at Law not peremptory.

A Diſmiſſion on an Election to proceed here, or at Law, is not peremptory, but the Plaintiff after failure at Law may bring a new Bill. 2 *Vern.* 32.

Diſmiſſion ſigned and inrolled may be pleaded in Bar.

Note, That an Order of Diſmiſſion, if duly ſigned and Inrolled, will be a good Plea in Bar of a new Bill brought for the ſame Matter. 1 *Harriſon's Ch. Pract.* 375, 3d. Edit.

When the Bill ſhall be diſmiſſed for want of Parties, and where the Cauſe ſhall be adjourned on paying the Coſts of the Day, until the Parties be added.

As to diſmiſſing Bills for want of Parties, the Diſtinction ſeems to be this; where the Parties omitted are really intereſted, and ſuch as have a Right by their Anſwer to controvert the Plaintiff's Title, and draw the Cauſe to a freſh Examination, there the Bill ought to be diſmiſſed with Coſts; but where the Parties omitted muſt be added merely for Form, there the Cauſe may be adjourned on Payment of the Coſts of the Day, and the Bill amended, and the proper Parties added.

Bill dimiſſed, not to be retained until the Coſt be paid.

And note, where a Bill is diſmiſſed, no Motion will be heard to retain it, until

until the Coſts of the Diſmiſſion be paid, and certified by the Attorney for the Defendant.

After Replication the Defendant cannot obtain a Diſmiſs but on hearing the Cauſe.

If the Plaintiff replies, the Defendant can never diſmiſs the Bill without hearing the Cauſe, becauſe he may rejoin *gratis* and prove his Anſwer, and ſo bring the Cauſe to a Hearing.

Of conditional Decrees and Diſmiſſes.

Of conditional Decrees.

THE Sentence or Judgment, is either conditional, or abſolute.

Abſolute, which, when declared, doth immediately bind the Party, and cannot be altered but by a Re-hearing, or by Bill of Review.

Conditional, where the Plaintiff or Defendant fail to appear, at the Day of Hearing, though duly ſerved with a *Subpœna* to hear Judgment.

Conditional Diſmiſs.

A conditional Diſmiſs, is analogous to a Non ſuit at Law, upon a *Non-pros*, or for want of the Plaintiff's Appearance at the Day of Trial.

RULES. Conditional Decree on the Defendant's not appearing on the Hearing.

By the 46th and 67th general Rules, if at the Day of Hearing, the Plaintiff be

be ready, and the Defendant maketh Default, Affidavit is to be made of the ſerving the Defendant with Proceſs, *ad audiendum Iudicium*, and the Court will proceed to Hearing, and after the Plaintiff's Bill is opened, the Defendant's Anſwer is to be read (upon Prayer of the Plaintiff's Council) and the Plaintiff's Proofs, whereupon the Court will Decree or diſmiſs the Cauſe, or otherwiſe order as ſhall ſeem fit. But in ſuch Caſe, the Court doth not uſe to make an abſolute Decree, but to give a Day to the Defendant, to ſhew Cauſe againſt confirming the Decree, at which Day, if he does come, and endeavour to ſhew Cauſe to ſtay the Decree, and that thereupon the Court doth proceed, the Defendant in ſuch Caſe, ſhall firſt pay down the Sum of * forty Shillings, (or more if the Court think fit) for the Plaintiff's double Attendance, by Reaſon of the Defendant's default.

But the Defendant ſhall have a Day to ſhew Cauſe againſt it, paying Coſts.

The Defendant's Anſwer is no further read than thus, *viz. The Anſwer of C. D. Defendant to the Bill of Complaint of A. B. Complainant*; *the ſaid Defendant ſaving and reſerving to himſelf, now, and at all Times hereafter, all Benefit, and Advantage of Exception, and ſo forth*; and a Word of the Anſwer is thus read, to ſhew that there was a *Lis conteſtata* in the

* By a late Rule, the Defendant is to pay five Pounds Coſt.

The Conditional Decree analogous to the *primum Decretum*, in the Canon Law.

the Cauſe, and this conditional Decree is analogous to the *primum Decretum*, in the Civil and Canon Law. *Marant.* 315.

If Cauſe be heard in part, and adjourned, and Defendant makes Default at next Hearing, Decree ſhall be abſolute.

But if a Cauſe be heard, and the Bill and Anſwer opened, and then is adjourned, though the Defendant makes default at the next Hearing, the Decree ſhall be abſolute; for the ſecond Hearing is to be conſidered as a Continuation of the former, when he did appear. *Moſeley's Rep.* 186.

How the Court will proceed where Defendant is obliged to appear *gratis*, and ſuffer no conditional Decree, and yet makes default.

When the Defendant's Attorney is obliged to appear *gratis*, and ſuffer no conditional Decree, yet does not appear on the Hearing, purſuant to the Rule, in ſome Caſes, the Court have abſolutely decreed the Cauſe, and in others, have only pronounced a conditional Decree, and ordered an Attachment againſt the Attorney. But note, in this Caſe, the Plaintiff's Attorney muſt have the Order on the Defendant to appear *gratis*, ready to produce, and ſhew to the Court.

Where a conditional Decree is pronounced, it muſt appear to the Court, that the Order for Hearing, hath been ſerved.

And, in all Caſes, where a conditional Decree is pronounced, it muſt firſt appear to the Court by Affidavit, that the Order for Hearing, called *the Order of the Day* hath been duly ſerved.

Conditional Decree how drawn, and the Time to ſhew Cauſe againſt it.

The conditional Decree is drawn thus; That the Plaintiff ſhall be relieved, according to the Prayer of his Bill, unleſs Cauſe

Cauſe be ſhewn to the contrary, the firſt Day of the next Term.

Conditional Decree, if not ſerved before the Term after which it was pronounced, to be renewed.

If the conditional Decree be not ſerved before the beginning of the Term, after which it is pronounced, it muſt be renewed, which the Court will order of courſe, upon Motion of the Plaintiff's Attorney, and that the Defendant ſhall ſhew Cauſe, the firſt of the next Term, after ſuch Order, Why the Decree ſhould not be made abſolute; and this Order is to be ſerved with the Draft of the Decree, and if it be above a Year ſince the conditional Decree was pronounced, the Plaintiff muſt firſt ſerve a *Subpœna* to elect an Attorney. See Executors *Toler* againſt *Shanly* and *Toler* in this Court, 24th *February* 1747.

If it lies dead above a Year, *Subpœna* to elect.

Proceedings to hear the Cauſe on the conditional Decree.

When this Decree is drawn up, the Plaintiff's Attorney moves, that the Cauſe ſhould be heard on the conditional Decree, on ſuch Day as the Court ſhall think fit; and the Plaintiff's Attorney is to ſet down the Cauſe to be heard on the conditional Decree, and is to ſerve the Defendant, or his Attorney, with a Copy thereof, and of the Order for hearing, eight Days at leaſt before the Day appointed for Hearing, and is to give the Defendant's Attorney Notice in Writing, that the Cauſe is ſet down purſuant to the Order, and if the Defendant

fendant doth not appear, on Affidavit of ſervice of the conditional Decree, and the Order for Hearing, the Decree is made abſolute*, and is to be drawn up, ſigned and enrolled, as is hereafter directed in Pa. 401. And this ſecond Decree is analogous to the *ſecundum Decretum* in the Civil and Canon Law.

The abſolute Decree, analogous to the *ſecundum Decretum* in the Canon Law.

If the Defendant intends to ſhew Cauſe, why the conditional Decree ſhould not be made abſolute, he muſt (as has been ſaid before) firſt pay unto the Plaintiff the Sum of five Pounds, the Coſt of his default, for not appearing on the Day of Hearing: And when theſe Coſts are paid, the Defendant may appear upon the next Hearing, and enter upon his Defence.

Defendant may ſhew Cauſe againſt the conditional Decree.

But muſt firſt pay five Pounds Coſt.

Concerning

* Where there are other Defendants, beſides thoſe againſt whom the conditional Decree was pronounced, the Court will poſtpone the pronouncing of the abſolute Decree againſt the Defendant or Defendants, who do not appear on the Hearing, until they can Decree on the Whole.

Concerning the drawing up Decrees and Diſmiſſes, and the Method of ſerving and enrolling them.

BY the 64th. general Rule, every Decree pronounced in any Cauſe, or Order made upon Debate, containing any Difficulty, is to be openly read in Court, immediately after pronouncing thereof, for Prevention of any Miſtake in the Drawing up the ſame.

RULE, 64th. Decrees and Orders to be read in Court, after pronounced.

And note, that all the Deeds and Evidences which are produced, and read upon the Hearing, and the Proofs to Support the ſame, are to be entered by the Officer in the Book of Hearings; and the Attorney for each Party is to be careful that all his own Proofs be carefully entered, and alſo that none be entered on the Part of his Adverſary, but ſuch as were produced and read upon the Hearing. But theſe Matters are generally ſettled by the Attornies in the Office, and the two Attornies ſign the Liſt of Evidences and Proofs produced on each Side.

The Evidence and Proofs to be entered.

By 50th. general Rule, the Drafts of Decrees, decretal Orders, and Diſmiſſes, are to be ſhewn to the Counſel for the Party for whom ſuch paſſeth, who find-

RULE. Draft of Decrees and Diſmiſſes, how to be ſerved.

ing the ſame agreeable to what was pronounced in Court, is to ſubſcribe his Name to the Draft, which is to be delivered to the adverſe Party's Attorney, with Notice to return the ſame in eight Days; which Time is given to the oppoſite Party, to conſult his Counſel who is likewiſe to ſubſcribe the Draft, or otherwiſe give his Exceptions in Writing under his Hand within the Time aforeſaid, to the End the Difference may be determined.

Ibidem. Note, by the preſent Practice, the Plaintiff's Attorney immediately upon ſerving the Decree moves the Court, and obtains an Order for the Defendant to return the Draft in the uſual Time, or the Officer to make it up according to the Notes, and ſerves the Defendant's Attorney with a Copy of this Order.

Drafts of Diſmiſſes, not to be ſerved. But the Drafts of Diſmiſſes are not now to be ſerved on the oppoſite Party, unleſs they be ſpecial, or where the Plaintiff has Liberty to file a new Bill, or commence an Action at Law.

How to proceed if the Draft of the Decree be not returned in Time. If the Defendant's Attorney neglects to return the Draft of the Decree, within eight Days after he hath been ſerved therewith, and with the Notice, and Order as aforeſaid, the Plaintiff's Attorney may, after the Expiration of the ſaid eight Days, move the Court for an Order,

Order, that the Officer ſhould ſettle the Decree according to the Notes, unleſs returned in a ſhort Day; which Order being taken out, the Officer iſſues a Summons to the Defendant; and if the Defendant's Attorney doth not attend the Officer, on the ſecond Summons, the Officer having a Copy of the Notes taken on the Hearing delivered to him, proceeds to ſettle the ſame according to the Notes, without any further Order to proceed *ex Parte*.

If the Defendant attends on the Officer's Summons he may make his Objections.

But if the Defendant's Attorney ſhall attend upon ſuch Summons, he may then make his Objections, which the Officer duly conſiders, and ſettles the Decree.

Decretal Order returned unſigned with Objections thereto.

If the Defendant returns the decretal Order unſigned, with Objections thereto, an Order is to be conceived that the Officer ſhould ſettle it, and he proceeds as in the other Caſe.

Decree to be paſſed before any Motion thereon.

No Motion is to be made on a Decretal Order, until it is paſſed with the Officer. *Moſeley's Rep.* 71.

Decree may be altered before it be paſſed.

If the Minutes taken on the Hearing are doubtful, or if either Party thinks himſelf really aggrieved by the Decree as it is drawn up, and going to be paſſed; or if he thinks the Minutes are wrong taken, or contrary to the plain Senſe

and Meaning of the Court, before the paſſing of the Decree, the Court, upon Counſel's Motion, will order the Officer to attend with the Minutes, and they will alter the Decree as drawn up, as they think proper, and direct the Officer to paſs it accordingly: But this Motion muſt be made before the Decree is paſſed, and in the ſame Term it is pronounced, or the Plaintiff muſt re-hear.

The Manner and Time of entering the Decree.

When the Decree is paſſed by the Officer, it is carried to the entering Book in the Office, and there entered; and all Decrees and other Orders are to be entered within a Year and a Day after they are made, or pronounced; or elſe the Party muſt obtain an Order to make them up *nunc pro tunc*.

Order to make up the *Nunc Pro tunc*.

Of ſigning by the Officer, by the Chief Baron, and enrolling it.

When the Decree is thus drawn up, and ſigned by the Officer, he is to preſent it to the Chief Baron for him to ſign, which is the Authority for the enrolling it, and by the Enrollment, it becomes a complete Decree.

Decree until enrolled may be altered by Rehearing or by Motion.

Decrees, until drawn up and enrolled, have the Force only of interlocutory Orders, and may be altered by Rehearing, and ſometimes by Motion.

In what Cauſe a Decree though enrolled, hath been altered by

But a Decree enrolled cannot be reverſed or altered but by a Bill of Review,

view, unleſs it be in miſtaking, *viz.* not Error in valuing, but in numbering, when the Caſe is demonſtrative, or where it has been obtained by Surprize, or if there was any Irregularity in it, and then it muſt be done by Order. 1 *Vern.* 131. So likewiſe if ſome Part of the Decree be omitted in the Enrollment, which being a Miſtake of the Officer, may be rectified upon Motion.

Motion, and not by Bill of Review.

It is ſaid, there was no Enrollment of a Decree until 36. *Hen.* 8. but the Decrees were written on the Back of the Bill. See a Diſcourſe of the Judicial Authority of the Maſter of the Rolls, See P. 20 in the *Preface.*

Decree when firſt enrolled.

It has been held, that in the drawing up a Decree, it is not ſufficient for the Regiſter to write the Bill and Anſwer, and then add that upon the reading of the Proofs, and hearing what was alledged on either Side, it was decreed ſo and ſo; but the Facts which were proved and allowed by the Court as proved, muſt be particularly mentioned in the Decree; otherwiſe if a Bill of Review be brought, thoſe Facts ſhall be taken as not proved: For elſe a Decree could not be reverſed by a Bill of Review, and all erroneous Decrees muſt be reverſed upon Appeals. 1 *Vern.* 214. 2 *Chan. Ca.* 161. *S. P.*

If the Facts which were proved and allowed by the Court muſt be particularly mentioned in the Decree.

Sed Quær. for there are many Decrees drawn up, where the Facts proved are never mentioned therein.

A Decree may be enrolled, after the Party's Death.

A Decree being pronounced in *Mich.* Term, and the Defendant dying ſoon after, on a Motion to have it enrolled, it was held by Lord Chancellor to be a Thing often done; and that it was like a Judgment at Law, which if pronounced before, may be entered after the Party's Death, and the Decree was enrolled accordingly. 2 *Chan. Caſes* 227. *Nel. Chan. Rep.* 169. *S. P.* 3 *Chan. Rep.* 73. *S. P.*

RULE. Decree not to paſs on conſent of Parties only.

By the 68th general Rule, no Decree is to paſs, grounded upon conſent of Parties, but on opening the Bill and Anſwer, and the State of the Matter in open Court, and the Hands of the Counſel on both ſides, are alſo to be to the Draft of the Decree, before the Chief Baron ſigns the ſame.

RULE Bill diſmiſſed in what Caſe retained.

And by the 69th general Rule, no Cauſe diſmiſſed upon full Hearing, is to be retained again, or any new Bill admitted, but upon new Matter appearing by Affidavit, as in a Bill of Review; but otherwiſe it is, in Caſe of other Diſmiſſions, which are not upon hearing the Cauſe.

By

RULE. Exceptions to the Draft of a Decree, 40s. Coſts to be lodged.

By the 28th general Rule, if Exceptions be taken to the Draft of a Decree or Diſmiſs, the Exceptant is to depoſite forty Shillings Coſt; and if they be ruled for him, he is to be repaid the ſame, but if againſt him the ſaid forty Shillings is to be paid to the other Party.

RULE. Coſts to be made up and taxed, though not aſcertained at the Time of pronouncing the Decree.

By the 66th general Rule, in all Cauſes, wherein a Decree or Diſmiſs is pronounced upon full Hearing, if no Coſts be aſcertained by the Court, or mentioned at the Time of pronouncing thereof, then the Party for whom the Decree is given, may make up his Bill of Coſts to be taxed of courſe.

How to be recovered.

And for this Coſt, when taxed by the Officer, a *Subpæna* is to iſſue, and it is to be demanded in the ſame Manner, as is before directed. See *Title Coſts*. And upon Affidavit thereof, and of Non-payment, the Court, on Counſel's Motion, will grant an Attachment for the Coſts, and the poſt Coſts. See hereafter the Proceedings for the Performance and Execution of the Decree.

Coſts diſcretionary in the Court.

The Court upon hearing the Cauſe, do ſometimes make a Decree for the Plaintiff as to ſome Points contained in the Bill, but diſmiſſes the Bill as to other Points; and ſometimes orders the Plain-

tiff to pay Coſts to the Defendant for ſo much of the Bill as is diſmiſſed, to be taxed by the Officer; and ſometimes orders the Defendant to pay the Plaintiff Coſts, to be taxed for ſo much of the Bill as is decreed for him, as the Court ſhall adjudge proper.

Ibidem. And ſometimes upon a full Hearing, the Court will, upon pronouncing the Decree for the Plaintiff, order the Defendant to pay him his Coſts to that Time. And if the Court refer Matters to the Officer as to Accounts to be taken, and the like between Plaintiff and Defendant, the Court commonly reſerves Coſts in theſe Caſes, until after the Officer hath made his Report; and after the Officer hath made his Report, the Court will give either Party Liberty to apply for further Directions, as they ſhall think fit, whereon, ſuch Order ſhall be made, as ſhall be juſt. And in this Caſe, after the Officer hath made his Report, and the ſame is abſolutely confirmed by the Court, either Party may apply to have the Cauſe heard on the Officer's Report, as to Coſts; which is always granted of courſe, and that Order being drawn up, and ſerved on the adverſe Attorney, and the Cauſe being ſet down to be heard upon the Report, the Court will order Coſts to be taxed by the Officer, and paid by the Party, as they ſhall think proper.

Cauſe heard on the Officer's Report, as to Coſts.

Of

Of the Force and Effect of Decrees, and who are to have the Benefit thereof.

A Decree doth not bind the legal Intereſt of the Eſtate, but the Perſon only who may be ordered to convey and aſſure the Intereſt; but it ſo far affects the Title to Lands and Goods, that by *Sequeſtration* and *Injunction*, the Court can diſpoſe of the Poſſeſſion to the Party, to whom of Right it belongs. 2 *Har. Cha. Pract.* 3d Edit. 107.

A Decree binds the Perſon only.

How far it affects the Title to Lands.

All original Parties to the Suit, or thoſe that are made Parties thereto, or to the Decree, of full Age, *compos Mentis*, &c. and ſuch as claim under them, *pendente Lite*, are bound by the Decree. 1 *Cha. Ca.* 3. 152. But any that *bona fide* came to be intereſted in the Matter in Queſtion, by Conveyance from the Defendant, before the Bill exhibited, and is not made a Party, either by Bill, or Order, is not bound.

Who are bound by Decree.

When a Perſon comes in *pendente Lite*, and whilſt the Suit is in full Proſecution, and without any Colour of Allowance from, or Privity of the Court, there the Decree bindeth. But if there were any Intermiſſion of Suit, or the Court were made acquainted with the Conveyance, the

Perſons coming in *pendente Lite*, how bound.

the Court is to give Orders, upon the ſpecial Matter, according to Equity and Juſtice.

Ibidem. A Decree ſhall not bind a Remainder Man, who is not a Party. 1 *Williams*, 91.

Ibidem. And no Decree ſhall be binding, to any of the Parties to the Suit, but thoſe who were ſerved with Proceſs, *ad audiendum Judicium*, or that did appear *gratis*.

Decree againſt an Infant, he has ſix Months after full Age to ſhew Cauſe. If there be an Infant in the Cauſe, and any Thing is prayed againſt him by the Decree, he muſt in all Caſes, have a Day given him to ſhew Cauſe, and that is at any Time within ſix Months after he comes of Age, and he muſt be ſerved with Proceſs for that Purpoſe.

To be ſerved with Proceſs for that Purpoſe.

Proceſs how to be ſerved. This Proceſs is by way of *Subpœna*, to be ſerved on the Defendant at his coming of Age; and being a judicial Writ, it muſt be returned in Term Time; if he ſhews no Cauſe, the Decree is made abſolute.

If the Infant may make a new Defence. It has been doubted whether after the Infant comes of Age, he can make a new Defence, when he comes to ſhew Cauſe; but of late it has been reſolved that he may do ſo, and it is now ſaid to be a Matter of courſe, and granted on a Petition, *ex Parte*. 1 *Williams*, 504. 2 *Williams*, 401.

And

And this Reſolution ſeems to be grounded on the higheſt Reaſon; for taking it for granted (which no body ever yet denied,) that nothing can bind an Infant, unleſs the Act to be done plainly appears to the Court to be for his Benefit; why then, ſhall he not, by the Indulgence of the Court, put in a new Anſwer, and make a new Defence, eſpecially when it appears to the Court, that the Defence made during his Infancy was totally wrong: Beſides, if this ſhould be refuſed him, to what End had he a Day given him; and if he be bound by his former Anſwer and Defence, and thoſe are only gone upon, as the Decree was upon the firſt Hearing, ſo will it be in this Caſe, upon the ſecond Hearing. But if he is to make a new Defence, or a new Caſe, it may vary from the former; and in that Caſe, the former Decree may, upon the new Defence appear to be very unjuſt, and may be reverſed; as in the Caſe of a *Feme Covert*, where a Bill is brought againſt her and her Huſband, during the Coverture, when he claims meerly in her Right, the Huſband dies, and the Right ſurvives to the Wife; the Wife ſhall file a new Anſwer, and make a new Defence, and draw into Queſtion and Examination the Validity of the Decree againſt her, during her Coverture, and avoid and reverſe it, if there be juſt Cauſe. See *Title Infant.* Ibidem.

Decree againſt a *Feme Covert* and her Huſband, when he claims in her Right, after his Death ſhe may make a new Defence.

If

One Executor be prohibited by Decree from receiving Money, and a Party preſent pays Money to him after, he ſhall pay it again.

If there are two Executors, and one of them by Decree is prohibited to receive any more Money, or meddle further with the Teſtator's Effects, and a Mortgagor to the Teſtator, who was preſent at the Hearing, and pronouncing the Decree, afterwards pays the Mortgage Money to the Executor, who had the Decree againſt him, he muſt pay it over again. 1 *Vern.* 57. 122. *S. C.*

An Agreement by ſome Tenants to ſtint a Common will be decreed againſt others.

An Agreement by ſome Tenants of a Manor, to incloſe or ſtint a Common, will be decreed in Equity; and ſuch Decree will bind two or three humourſome Tenants who oppoſe it. 1 *Cha. Ca.* 48. 2 *Vern.* 103. *S. P.*

A Purchaſer with Notice, bound by the Decree.

If a Deviſee obtains a Decree, to hold and enjoy the Lands againſt the Heir, who it was ſuppoſed had ſuppreſſed the Will, and, pending the Suit, a third Perſon gets an Aſſignment of a Mortgage, made by the Teſtator, and then purchaſes the Equity of Redemption of the Heir, having Notice that there was ſuch a Will, the Purchaſer ſhall not be admitted to diſpute the Juſtice of the Decree, nor to try at Law, whether the Will was cancelled by the Teſtator. 2 *Vern.* 216.

Decrees ſometimes bind Perſons, not Parties or Privies.

Decrees do ſometimes bind Perſons not Parties, or Privies; as four named to defend for a Pariſh, the Decree will conclude

clude the Inhabitants. So, in Caſes of Incloſures of Common, Suits to ſettle the Cuſtoms of a Manor, *&c.* A Decree will bind ſome Tenants who are not Parties, and others who oppoſe it; otherwiſe, Suits would be endleſs, if where there are Numbers, all muſt be Parties; for there would be perpetual Abatements, and no Right would be done. 1 *Cha. Ca.* 48. 272. 2 *Vern.* 103. 184. *Ca. in Eq. Abr.* 163.

Decree concerning Lands, to be entered with the Regiſter in ſix Months, or not to prejudice Purchaſers.

Where a Decree concerns Lands, even of Leaſes for Years, it muſt be entered with the Regiſter, within ſix Months, or elſe ſhall not prejudice Purchaſers. 2 *Har. Cha. Pract.* 3d Edit. 107.

He that purchaſes after a Bill exhibited, does it at his Peril.

And he that Purchaſes after a Bill exhibited againſt the Vendor, does it at his Peril. 2 *Cha. Ca.* 223.

An Adminiſtrator of an Adminiſtrator, cannot inroll a Decree.

If an Adminiſtrator obtains a Decree, that he, his Executors, or Adminiſtrators, may redeem a Mortgage, and he dies inteſtate before inrolment of the Decree, it ſhall not afterwards be inrolled, for the Benefit of his Adminiſtrator, for the firſt Adminiſtrator's Title is gone. 2 *Cha. Ca.* 248.

But he may carry on a Decree to an Account.

But it is ſaid, if the firſt Adminiſtrator obtains a Decree, to an Account, and dies, that the ſecond may carry it on. 1 *Vern.* 25.

Decrees

Decree for Huſband and Wife in her Right, ſhe, if he dies, to have the Benefit.

Decrees for Huſband and Wife, in Right of the Wife; if the Huſband dies, his Widow, not the Executors, ſhall have the Benefit of the Decree. 1 *Cha. Ca.* 27.

Decrees equal to Judgments at Law.

And here let it be obſerved, that Decrees of Courts of Equity are deemed equal to Judgments at Law, and their Execution as effectual or more ſo. *Morrice* againſt Bank of *England*, *Caſes temp. Talb.* 217, &c. See *Pages* 419, 420.

Decree prior to a Judgment at Law, preferred.

A Decree againſt an Executor, was preferred to a Judgment at Common Law againſt him, upon its being prior in Time. *Preced. in Chan.* 79.

Intereſt decreed on a Sum liquidated, at Time of filing Bill.

If a Sum be liquidated, at the Filing of the Bill, or before, the Court will decree Intereſt, where the Plaintiff is neceſſitated to come here. 2 *Har. Ch. Pract.* 3d Edit. 105.

Of the Performance and Execution of the Decree.

Decree is *in Perſonam* or *in Rem*.

THE Decree is either *in Perſonam*, or *in Rem*; if *in Perſonam* it is executed in Manner following.

After

After it is ſigned by the Officer of the Court, and by the Lord Chief Baron, the Plaintiff is to ſerve the Defendant with an atteſted Copy thereof, perſonally, if poſſible, or with an Exemplification of the Decree, under the Seal of the Court, and muſt at the ſame Time ſerve an Injunction for the Performance thereof: And if the Decree be for Payment of Money, the Perſon employed to ſerve the ſame, muſt have a Letter of Attorney, impowering him to receive the Money mentioned therein, and muſt make a Demand of the ſame, and ſhew his Letter of Attorney, impowering him to receive the ſame, and to releaſe the Defendant.

In Perſonam, and how executed.

What is to be obſerved if the Decree be for Payment of Money.

By the 70th. general Rule, Attachments for not performing Decrees, may be iſſued of Courſe, Affidavit being firſt made and filed, that the Defendant hath been perſonally ſerved with the Decree, but if out of the Kingdom, and not to be found, Affidavit is to be made thereof, and the Court upon Motion, may order the Service of his Wife or his chief Servant to be good Service.

RULE. Attachment for not performing Decree, on Affidavit of perſonal Service, and how Plaintiff is to proceed if Defendant be out of the Kingdom, or abſconds.

And by the 71ſt. general Rule, in all Attachments for not performing Decrees, and for Non-payment of Coſts, particular Notice is to be given in the Body thereof, what it is for, to the End that the

RULE. To be mentioned in the Body of the Attachment, what the Decree is for.

the Sheriff may be more careful and wary in the Execution, or taking Security in ſuch Caſes.

How to proceed, if the Decree be diſobeyed.

Upon Diſobedience of the Decree, after Service as aforeſaid, the old Way was, to ſpend the whole Proceſs of the Court from Attachment, to Sequeſtration; but this Method was found to lean hard upon the Plaintiff (who might have been delayed in obtaining a Decree) that after he had got Judgment for his Demand, he ſhould be obliged to run through the whole Proceſs, which would take up a Year, in which Time, if the Party died or removed out of the Kingdom, the Fruit of his Decree was in Danger of being loſt; for which Reaſon, it became neceſſary to ſhorten the Practice; and therefore now, after a Return of a *non eſt inventus* upon an Attachment, a Serjeant at Arms ſhall iſſue, and upon the like Return a Sequeſtration, which two laſt Writs are to iſſue, upon Orders firſt obtained, as is hereafter directed. See the Proceedings on Sequeſtrations, *Title Proceſs.*

Contempt for not performing the Decree.

Sequeſtration.

Sequeſtration, though Defendant be taken and impriſoned.

So if the Defendant be taken, and lie in Priſon, obſtinately refuſing to perform the Decree, the Court will grant a Sequeſtration. 2 *Cha. Rep.* 151. See Pa. 419.

If

If a Decree be in *Rem*, yet it may be executed upon the Perſon in Manner aforementioned, or elſe it may immediately be executed in *Rem*, by an Injunction to the Sheriff, to put the Party in Poſſeſſion of the Thing decreed: And where a Decree is for the Poſſeſſion of Lands, and that the Plaintiff would be put into immediate Poſſeſſion, he may before the Decree is ſerved, and without waiting for its being made up, apply to the Officer of the Court, who, upon lodging the Fees of the Decree, will make out a ſhort Order for an Injunction to the Sheriff, to put the Plaintiff into Poſſeſſion; but after the Injunction is executed, if by the Decree, an Account is to be taken of the meſne Profits of the Lands, then the Decree is to be made up, and ſerved in the uſual Manner.

Decree in *Rem*, and how to be executed.

Though in an Injunction to put the Plaintiff in Poſſeſſion upon a Decree, there is always a Clauſe to quiet the Party from time to time in the Poſſeſſion; yet it is no breach of the Injunction in any Perſon, who is not a Party to the Decree, to diſturb the Poſſeſſion, after the Poſſeſſion is firſt given by the Sheriff on the Injunction: otherwiſe a Man who was no Party to the Decree, and yet had a real Title to the Land, might be for ever debarred from re-

No Breach of an Injunction on a Decree, if a Perſon not Party, diſturbs the Poſſeſſion.

covering or trying his Right. This was ſolemnly determined in the *Exchequer*, 14th *May*, *Eaſter* Term, 1743, in the Caſe of *Swan*, and *Fitzſimons*.

Injunctions for Poſſeſſion, ſometimes granted, pending the Suit, or the Rents to be paid into Court, and ſometimes both, and the Court will appoint a Receiver.

Sometimes, pending the Suit, the Court will order a Party Poſſeſſion by Injunction; or that the Rents not already paid, ſhall be ſtaid in the Tenants Hands till Hearing, and ſometimes will order both; at other Times, will order a Receiver, who upon good Security ſhall take the Rents and Profits, and pay them into Court, or account for them when the Court ſhall require; and he to enter into ſuch Recognizance as theCourt directs, to ſecure his accounting for, and paying ſuch Rents into Court.

The Lord Chancellor will inforce the Decree of a prior Lord Chancellor.

The Lord Chancellor for the Time being, will inforce the Execution of Decrees, though made by a prior Lord Chancellor: And though they are alledged to be unreaſonable, yet will aſſiſt with the utmoſt Proceſs of the Court, 'till they come regularly before him to be reverſed. 2 *Chan. Rep.* 127.

The Court may enlarge Time for performing Decree, though ſigned and enrolled.

If by a Decree Mortgage Money is to be paid at a certain Time, yet in caſe of inevitable Neceſſity, the Court may enlarge the Time, though the Decree be ſigned and enrolled. 1 *Chan. Ca.* 64.

Upon

Upon a Decree for Payment of Money, after a Writ of Execution, and an Attachment returned, the Court refuſed to give Leave to the Defendant to be examined, as to the Contempt, or the Performance of the Decree, unleſs he would give Security to abide the Decree. 2 *Vern.* 91.

After Attachment returned, Defendant not admitted to be examined as to the performance of the Decree, or the Contempt, but on giving ſecurity.

In the Caſe of *Searle* againſt *Lane*, 2 *Vern.* 88, it was determined, that if an Adminiſtrator pays a Debt by by Bond, before a Debt due by a Decree, although he hath no Notice of the Decree, it is a Miſpayment, and the Adminiſtrator muſt pay the Debt due by the Decree. And in the ſame Caſe it was determined, that a Decree of the Court was equal to a Judgment at Law, and the filing of a Bill, equal to the filing of an Original at Law, to prevent the alienation of Aſſets. And in *Talbot's Reports* 222, that the execution of a Decree is as effectual as a Judgment at Law, or more ſo; for there may be a Sequeſtration againſt the Goods, although the Party is in Cuſtody upon the Attachment; whereas, at Law, if a *Capias ad Satisfaciendum* is executed, there can no *Fieri facias* iſſue. 2 *Williams* 483. *Preced. in Chan.* 79. 174.

A Decree is equal to a Judgment, as to the perſonal Eſtate, and to be paid accordingly, in a Courſe of Adminiſtration.

There may be a Sequeſtration of the Goods, although the Party is in Cuſtody on the Attachment.

A Decree for a Debt, binds not the real Aſſets deſcended to the Heir, as a Judgment does.

But note, where it is ſaid that a Decree is equal to a Judgment, or to be paid next thereto, this muſt be intended only out of the perſonal Eſtate.

The only way upon a Decree, for Debt to affect Lands, is to proceed for a Contempt to a Sequeſtration, but ſuch Sequeſtration abates by the Death of the Party, which an Extent does not.

A Decree for a Debt does not bind the real Eſtate, acting only in *Perſonam*, not in *Rem*; and the Remedy upon ſuch a Decree to affect the Land, is only for a Contempt, whereupon the Party proceeds to a Sequeſtration, which Proceſs is not of a very long ſtanding: And that a Sequeſtration is but a perſonal Proceſs, appears by its falling and abating by the Death of the Party: On the other hand, a Debt upon a Judgment does not ſo abate, and Judgments did not affect the Land, until the Statute of *Weſtminſter* 2d 13th *Edw.* 1 ch. 18, Which can hardly be thought to have includeded a Decree, nay, it plainly does not; for if ſo, it would have affected but a Moiety of the Land, whereas upon a Sequeſtration, the Plaintiff takes the whole Profits: And if a Decree for a Debt be obtained, and the Defendant die leaving no perſonal, but a conſiderable real Eſtate in Fee, the latter will not be affected by the Decree, in the Hands of the Heir, as it would in Caſe of a Judgment; and were this otherwiſe, ſurely after ſo many thouſand Decrees, and Inſtances of Deficiencies of perſonal Aſſets, for the ſatisfying thereof, ſome

Caſes

Caſes would be found, where Lands had been ſequeſtered for ſuch Debts in the Heir's Hands. But no Precedent of this Kind was ever heard of: So determined in the Caſe of *Bligh* againſt Lord *Darnley*. 2 *Williams*, 621, 622.

For further Proceedings on Sequeſtrations on Decrees, ſee *Title Proceſs*, and the Proceedings there, on Sequeſtrations.

For what Cauſes a Decree may be ſet aſide.

Decree for what Cauſe, ſet aſide.

WHERE Matters have been examined in Equity, and determined, the Court is cautious of unravelling former Decrees, Agreements, or Releaſes; but if there be an apparent Fraud in a Decree, the Court will upon an original Bill, ſet it aſide. 1 *Williams* 723. *Talbots Rep.* 201.

Plea of a Decree over-ruled on Suggeſtion of Fraud.

On Suggeſtion of a groſs Fraud, the Court will upon an original Bill, over-rule a Plea of a Decree, and a Report made and confirmed thereon, if the Suggeſtion of Fraud be not denied by the Defendant's Anſwer. 2 *Williams* 73.

An Infant aggrieved by a Decree, not bound to ſtay till he is of Age, but may apply as ſoon as

If an Infant conceives himſelf aggrieved by a Decree, he is not under a Neceſſity to ſtay till he comes of Age,

he thinks fit to reverſe or ſet it aſide.

before he ſeeks Redreſs, but may apply for that Purpoſe, as ſoon as he thinks fit; neither is he bound to proceed by way of Re-hearing, or Bill of Review, but may impeach the former Decree, by an original Bill; in which, it will be enough for him to ſay, the Decree was obtained by Fraud and Colluſion, or that no Day was given him to ſhew Cauſe againſt it: So held by Lord Chancellor *Macclesfield* in the Caſe of *Richmond* and his Wife, againſt *Taleur*. 1 *Williams*, 737. But Mr. *Cottingham* (his Lordſhip's Secretary) acquainted the Court, that Mr. *Vernon*, in caſe of an erroneous Decree againſt an Infant, uſed always to adviſe the bringing an original Bill to ſet it aſide, but in ſuch Bill to alledge ſpecially the Errors in the former Decree.

A Decree againſt an Infant, *Nil, &c.* is an abſolute Decree. And when he comes of Age, he cannot ſet it aſide.

By an original Bill, unleſs for Fraud and Colluſion; but he may amend his Anſwer, and file a Bill of Diſcovery for that End.

A Decree againſt an Infant, although he hath a Day given him after he comes of Age to ſhew Cauſe againſt it, yet it is an abſolute Decree; for when the Court have given their Judgment, nothing can hinder it's being abſolute, but the Defendant's ſhewing Cauſe; but he cannot come and controvert this Decree by another Bill (and the Caſe is ſtronger againſt an Infant, becauſe he may amend his Anſwer) but may controvert this Decree two Ways, if there was any Fraud or Colluſion between the Plaintiff and his Guardians, by an original

original Bill; or if Matter that then appeared was not inſiſted on; or if he has diſcovered new Matters ſince the Decree, he may amend his Defence, and have a Bill of Diſcovery. *Moſeley's Rep.* 308.

Decree ſet aſide for Fraud.

In the Caſe of *Coote* and *Woods* againſt *Reilly* and others, in this Court in *Hillary* Term, 1738; a Decree was obtained for Sale of the Defendant *Reilly*'s Eſtate, (who was a Minor) for the Payment of ſeveral Debts and Incumbrances; after the Decree had been enrolled, and the Lands ſet up to be ſold, a Motion was made on behalf of the Minor, (on Affidavit of ſeveral Debts being wrongfully brought in to Charge, and reported to be due, and of Fraud and Colluſion in obtaining the Decree) to ſtay the Sale, and upon ſuch Application, the Court ordered the Sale to be ſtayed, until the Defendant *Reilly* ſhould file his Bill, and afterwards upon a full Hearing in *Mich.* Term, 1744, the former Decree was ſet aſide, and a new Account decreed by the Court.

But if the Decree be not fraudulent, though not ſo equitable, it ſhall not be ſet aſide.

On a Bill to ſet aſide a Decree againſt an Infant for Fraud, and the ſame appearing not to to be fraudulent, though in every Reſpect not ſo equitable, the Court refuſed to ſet the Decree aſide. 1 *Williams*, 735.

In what Caſes an original Bill may be filed, to explain, confirm, revive, execute, or inforce the Performance of Decrees, ſee Pa. 339, *Title original Bills.*

The Proceedings on Decrees to foreclose Mortgages, and for Sale of Lands, and on confirming the Sale.

On a Decree to foreclose, a limited Time given to pay the Money.

WHERE the Decree is for a Sum of Money reported due with Coſt, in this Caſe, the Court gives the Defendant a limited Time to pay the ſame, (generally three Months,) or the mortgaged Premiſſes to be ſold, which Decree muſt alſo be perſonally ſerved, if poſſible.

If not paid, the mortgaged Premiſſes poſted to be ſold, 14 Days between the Poſting and the Sale.

And if the Defendant doth not pay the Sum decreed, with the Coſt, within the Time limited as aforeſaid, the Plaintiff may enroll the Decree, and may then poſt up the mortgaged Premiſſes for Sale; and there muſt be fourteen Days between the Day of the Poſting, and the Day of the Sale.

Method of confirming the Sale.

Where a Perſon is upon ſuch Sale declared a Purchaſer, he is to take out a Certificate thereof, ſigned by the Chief Remem-

Remembrancer, and thereupon the Attorney concerned for the Purchaſer, may without Notice move the Court, that the Sale may be confirmed, which the Court will grant, unleſs Cauſe be ſhewn to the contrary in eight Days after Service of the Order.

And Copies of this Order are to be ſerved upon all the Attornies, that were concerned in the Cauſe, either for Plaintiffs or Defendants, or elſe upon the Parties themſelves. Ibidem.

And if no Cauſe be ſhewn, in eight Days after Service of the Order, againſt confirming the Sale, the Court will on the ninth Day, after ſervice of the Order, upon Motion of the Attorney for the Purchaſer, and upon his producing to them an Affidavit of the Service of the Order and a Certificate from the Chief Remembrancer, of no Cauſe being ſhewn, and alſo a Certificate of the Depoſite being made, confirm the Sale. Ibidem.

When the Sale is confirmed, a Deed of Conveyance is to be dawn, and executed by the Officer, and the Parties are to join in the conveying of the Lands. Ibidem.

Then upon Counſel's Motion, upon an atteſted Copy of the Certificate of the Purchaſe Money being paid, the Court Injunction to put the Purchaſer in Poſſeſſion.

Court will grant an Injunction to put the Purchaſer into Poſſeſſion of the Lands ſo ſold to him.

And note, upon all the foregoing Motions, it will be proper to have the Decree ready to produce to the Court.

If the Defendant refuſes to execute the Deeds, the Court will grant an Attachment.

If the Party againſt whom the Decree is made, refuſes to join in the Execution of the Deeds, the Court, upon Counſel's Motion, will award an Attachment to the Purſuivant againſt him; but in this Caſe, the Plaintiff's Attorney muſt produce the Decree, and a Certificate from the Officer, of the Sale being confirmed.

Depoſite not paid, Lands to be again ſet up.

If Lands are ſet up to be ſold by publick Cant, and are ſold to a Purchaſer, and he neglects, or refuſes to pay the Depoſite, the Court, on the Officer's Certificate thereof, and on Counſel's Motion thereon, will Order the Lands to be again ſet up to be ſold.

How to proceed, if a Purchaſer neglects, or refuſes to pay the Remainder of the purchaſe Money after a Depoſite.

If the Purchaſer lodges a part of the Purchaſe Money with the Officer, but neglects, or refuſes to pay the Remainder, or to compleat his Purchaſe, the Court, on Counſel's Motion, and upon producing the Decree, and a Certificate of the Sale will order the Purchaſer to compleat the Purchaſe, and pay the Remainder

mainder of the Purchaſe Money, or forfeit his Depoſite. So ordered in the Caſe of Executors of *Campbell* againſt *Drake*, in this Court, 18th *February*, 1747.

But a Court of Equity will not compel a Purchaſer under a Decree, to accept a doubtful Title. So reſolved in the Caſe of *Marlow* againſt *Smith*. 2 *Williams*, 201. And the Court ordered the Purchaſer to be paid back his Depoſite.

Court will order the Depoſite to be paid back, if the Title be doubtful.

And if a Purchaſer ſubmits to forfeit his Depoſite, the Court will in no Caſe, compel him to proceed in the Purchaſe. 1 *Williams*, 748.

If the Purchaſer will forfeit his Depoſite, the Court will not compel him to proceed.

And note, in all Caſes, where a Perſon who is declared the Purchaſer, ſhall afterwards decline compleating the Purchaſe, the Lands muſt be ſet up again; for they cannot regularly be ſold by the Officer, to the next Bidder, on the original Cant. See the Caſe of *Reilly* and others againſt *Newcomen* and others, in this Court, *Eaſter* Term, 1755.

Where the firſt Purchaſer declines compleating the Purchaſe, the Lands muſt be ſet up again.

Although by a Decree, Mortgage Money is to be paid at a certain Time, yet in Caſe of inevitable Neceſſity, the Court may enlarge the Time, though the Decree be ſigned and enrolled. 1 *Ch. Ca.* 64.

Time enlarged to pay the Mortgage Money.

Where

Purchaſer under a Decree, ordered to pay the Purchaſe Money, this not a Debt due by Decree.

Where a Perſon is allowed the beſt Purchaſer under a Decree, and is ordered by the Court to pay the Purchaſe Money, this is not a Debt due by Decree, but only by Order of Court: So held in the Caſe of *North* againſt *Anſell*. 2 *Williams*, 621.

Time for redeeming on a Bill of Foreclo ſure, is according to kalendar Months.

When a Decree of Foreclo ſure is made, the Time for redeeming muſt be computed according to kalendar Months, and not according to lunar Months. *Barnard's Rep.* 324.

How the Account is to be ſtated on a Decree of Foreclo ſure.

On Mortgages and other Securities carrying Intereſt, the Officer in his Report, is to compute Intereſt to the Time the Money is appointed to be paid, and the Principal and Intereſt become a liquidated Sum, from the Time the Report is confirmed, and ſhall bear Intereſt from thence; or from the Time it might have been confirmed, by the ordinary Courſe of the Court, in Caſe any unneceſſary Delay ſhall be given, by objecting or excepting thereto.

Diſclaimer.

Diſclaimer what.

A Diſclaimer, is where a Defendant upon Oath, by his Anſwer, denies that he hath, or claims any Right or Title, to the Thing demanded by the Plaintiff's

tiff's Bill; and diſclaims, that is, renounces all Claims, or Pretences of Title, or Claim thereto.

Bill if vexatious diſmiſſed with Coſts.

And in ſuch Caſe, if it appear that the Plaintiff's Bill was exhibited againſt the Defendant only for Vexation, the Court will diſmiſs it, and give Coſts againſt him.

If the Plaintiff had probable Cauſe, he may have a Decree on Payment of Coſt.

But if the Plaintiff had any probable Cauſe, or Reaſon to induce him to exhibit his Bill againſt ſuch Defendant, he may, if he pleaſes, by Motion, pray a Decree againſt the Defendant, and all claiming under him ſince the Time of exhibiting the Bill; but this is ſeldom decreed, but on Payment of the Defendant's Coſts.

A Party made a Defendant, who has no Right, and diſclaims, may be ſtruck out and examined as a Witneſs.

If one be named a Defendant in a Bill, among other material Defendants, who no ways pretends any Right to the Matters in Queſtion, and he thereupon diſclaims, the Attorney for any other Defendant in the Cauſe may, after ſuch Diſclaimer, if he thinks it neceſſary, on Motion, obtain an Order of the Court, that the Party ſo diſclaiming may be examined as a Witneſs in the Cauſe; for it ſhall be preſumed his Name was inſerted in the Bill, without other Cauſe than only to take away his Teſtimony.

And

If Defendant diſclaims, and Plaintiff replies, and ſerves *Subpœna* to rejoin, he ſhall pay Coſts to be taxed.

And where a Defendant diſclaims generally to all the Matters in the Bill, the Plaintiff is not to reply; if he does, and ſerves the Defendant with a *Subpœna* to Re-join, the Defendant may may have Coſts againſt him for the Vexation to be taxed.

But if the Diſclaimer be but to Part, Plaintiff may reply to the Part anſwered.

But if the Diſclaimer be only to Part of the Matter in Queſtion, but as to the other Part there is an Anſwer, in ſuch Caſe, there may be a Replication to that Part that contains the Anſwer.

Duces tecum.

Duces tecum what, and how to be ſerved.

A *Subpœna duces tecum*, is a Writ that iſſues from a Court of *Chancery*, commanding a Perſon to appear at a certain Day in the Court, and to bring with him ſome Deeds, or other Writings, or Evidences which the Court would view; and this *Subpœna* is to be ſerved in the ſame Manner with the *Subpœna* to Anſwer.

In what Caſes.

Where a Plaintiff requires Deeds or Writings to be lodged in Court, he muſt in his Bill, pray for a *Duces tecum*

cum along with the *Subpœna* to anſwer; and if the Defendant by his Anſwer, confeſſes the having in his Hands or Cuſtody, any Writings, Evidences, or other Things material for him to be examined upon, or confeſſed to belong to the Plaintiff, the Court, upon Motion of the Plaintiff's Counſel (without Notice) will grant an Order for a *Duces tecum*, for the Defendant to bring them into Court, or ſhew Cauſe to the contrary.

RULE.

Duces tecum not to iſſue but by Order, and the Deeds to be mentioned in the Order.

By the 2d general Rule, no *Subpœna duces tecum* is to iſſue without Order made in open Court, and in the Order for the *Duces tecum*, the Deeds are to be particularly mentioned, and to be ſerved with the *Subpœna*.

Motion for it, to be by Counſel.

And note, this Motion for the *Duces tecum* is to be by Counſel.

Attachment, if Deeds be not lodged in 4 Days after ſervice of the Order.

And if the Defendant does not lodge the Deeds in four Days after the Return of the *Subpœna*, an Attachment, on Counſel's Motion, will be granted againſt the Defendant, on Affidavit of the Service of the *Subpœna* and Order.

How to manage, if the Deed be the Defendant's Title.

But if the Defendant apprehends the Deeds ought not to be lodged in Court, as being his Title, and ſets forth the ſame in his Anſwer, or ſhews thereby any

any Title to the ſaid Writings, then he ought to appear, and pray by his Counſel, (which is a Motion of courſe) it may be referred to a Baron to report his Opinion thereon, and the Court will make an Order accordingly.

If Defendant denies his having the Deeds, Plaintiff has no Remedy.

If the Defendant, by his Anſwer doth not confeſs, (but denies) the having ſuch Writings in his Hands, he ſhall be excuſed from any Contempt, though he neither brings them into Court, or ſhews Cauſe to the contrary.

The Court will not in a ſummary Way, order Deeds to be brought into Court, though confeſſed to be in Defendant's Hands.

In the Caſe of *Lewis* againſt *Burke*, 24th, *Feb.* 1748, it was determined, that the Court will not in a ſummary Way order Deeds, *&c.* to be brought into Court, though confeſſed in the Defendant's Anſwer; the Plaintiff muſt iſſue a *Duces tecum*, it being the ordinary Courſe, that the Defendant may have an opportunity of conteſting the bringing in of the Deeds, if he apprehends it would prejudice him to do ſo: But the Court, (upon Counſel's Motion,) will order all Deeds that are proved in the Cauſe to be produced on the Hearing, Notice being firſt given of the Deeds, *&c.* required, and of the Motion, and in Default thereof will award an Attachment to the Purſuivant.

But will order all Deeds proved in the Cauſe to be produced on the Hearing.

And

And if the Plaintiff's Attorney apprehends, that the Motion for a Reference to a Baron is but for Delay, he may at the ſame Time, or immediately after, move, that the Defendant may attend a Baron to procure a Report in a ſhort Day, or the Order of Reference to be diſcharged, and the Court will make an Order, that the Defendant do procure a Report in four Days after Service of the ſaid Order, or the Order of Reference to be diſcharged; and if the Defendant proceeds not, within the ſaid Time, or does not obtain further Time (which the Court upon ſpecial Application for that Purpoſe, and Cauſe ſhewn will grant,) the Court, upon Motion of the Plaintiff's Attorney, and upon producing the laſt Order, an Affidavit of the Service thereof, and a Certificate from the Chief Remembrancer of no Report being filed, will diſcharge the Order of Reference abſolutely: And will alſo order the Defendant to bring in the Deeds in two or four Days, (as they ſhall think reaſonable,)or an Attachment to iſſue againſt the Defendant without further Motion.

How the Plaintiff is to proceed if he apprehends the Motion for a Reference to a Baron be for Delay.

Of Exceptions to Anſwers, and the Proceedings thereon; and in confirming the Baron's Report.

Exceptions what, and in what Caſes, and how to be drawn.

EXCEPTIONS are the Allegations of a Party in Writing, alledging that ſome pleading or proceeding in a Cauſe is inſufficient, or not perfectly anſwered in a certain Point or Points, particularly expreſſed and ſet forth in ſuch Exceptions; and theſe Exceptions are to be drawn, (or at leaſt peruſed) and ſigned by Counſel, are to be ingroſſed on Parchment, ſigned by Attorney and filed.

If an Anſwer be ſhort, Plaintiff may except thereto.

If an Anſwer be inſufficient, in one or more Points, the Plaintiff may except thereto, and force the Defendant to put in a better Anſwer.

If it be good to a common Intent, he ſhould reply.

But if the Anſwer be good to a common Intent, the Plaintiff muſt reply, and prove the Matter of his Bill to be true, if he can, and not inſiſt upon the inſufficiency of the Anſwer; but this muſt be intended of Things tranſacted publickly, whereof there may be a general Cognizance; for Matters done by the Defendant privately, or reſting in his own

own knowledge only, he ought to anſwer particularly, and certainly.

Exceptions not regularly, after Replication.

But no Exceptions can regularly be taken to an Anſwer, after Replication, for thereby the Anſwer is admitted ſufficient; yet in ſome Caſes, the Court will order the Replication to be withdrawn, and the Exceptions received.

In ſome Caſes allowed.

Exceptions to Anſwers, were at the Civil Law, and why.

And theſe Exceptions to Anſwers are totally Creatures of the Court of *Chancery*; for the Exceptions in the Civil Law were to the Bill, and are in the Nature of our Pleas and Demurrers, as is before mentioned: But there were no Exceptions to Anſwers; becauſe upon the *Libellus articulatus* the Defendant was examined before the Judge, and therefore, the Judge took down the Anſwer of the Defendant particularly, and if he did not anſwer, he was contumacious in the Face of the Court, and to be dealt with as ſuch; but the Court of *Chancery* having remitted it to Counſel to draw the Anſwer, they very often draw it ſhort, and evaſive, and therefore, they had not the effect of the Anſwer on the *Libellus Articulatus* in the Civil Law; and hence, it came to paſs, that when the Anſwer was ſhort, they referred it to the Maſter upon the Exceptions, to ſee if the Anſwer was ſufficient; if it were not ſo, he reported it inſufficient, which was a direction for

The Method of taking the Defendant's Anſwer at the Civil Law.

a further Anſwer, and then the Counſe drew the ſecond Anſwer, as they did in the firſt Inſtance. Hence, if the Anſwer came in, in Vacation, the Exceptions were to be put in the ſame Vacation; if the Anſwer came in in Term time, the Exceptions were to be put in the ſame Term. This was eſtabliſhed upon the Method of the Civil Law, though with ſome Variation; for when the Anſwer was given in to the Poſitions, they then put in the *Libellus articulatus* which was to be anſwered before the Judge. But in this Court, the Exceptions are referred to one of the puiſne Barons; and as they do not ſit during the whole Vacation, by reaſon of Circuits, the Time for filing Exceptions, according to the coming in of the Anſwer, is governed by the following Rule.

Method of forming the Exceptions, and preparing for the Reference.

And note, there is more Skill required in forming theſe Exceptions to Anſwers, properly, than is commonly ſhewn; often two or three Charges, and perhaps ſometimes in no ſort relating to each other, are mixed in one and the ſame Exception; which makes it ſo complex and complicated, and of courſe confuſed, that it is moſt difficult to determine whether it be anſwered or not: Whereas every Charge in the Bill, ſuppoſed not to be anſwered, with the Interrogatory relating to that Charge, only ſhould be a diſtinct Exception. Then, in preparing

Briefs

Briefs for the Counſel on the Reference; let the Exceptions ſo formed as aforeſaid, Charge and Interrogatory, be placed in one Column of a Sheet of Paper, and the Anſwer to both, on the other Column, with the Numbers and Folios in the Bill and Anſwer; by which Method, the whole will lie before the Counſel at one View, and ſave much Trouble, Time and Confuſion on the Reference.

RULE. The Time for filing the Exceptions.

By the 24th general Rule, all Exceptions to Anſwers ſhall be filed either in the ſame Term the Anſwer comes in, or within the firſt eight Days of the next enſuing Term. And if the Anſwer comes in, in Vacation time, then the Exceptions ſhall be filed by the end of the next ſucceeding Term, but after that Time not to be allowed. And no Anſwer ſhall be deemed to be filed, until the Contempt be purged; and until the ſame ſhall be ſo purged, the Plaintiff may proſecute the Contempt, notwithſtanding any Anſwer alledged to have been filed.

No Anſwer to be deemed filed, till the Contempt be purged.

No Exceptions till after Adjudication of Plea, or Demurrer.

And no Exceptions ſhall be taken to an Anſwer, where the Defendant in the ſame Anſwer pleads, or demurs, until ſuch Plea, or Demurrer be firſt adjudged, and after ſuch Adjucation, the Plaintiff ſhall have the uſual Time for taking Exceptions. See *Title Anſwers*, &c.

Time for excepting granted on Motion; and in this Caſe, if the Defendant allows the Exceptions, before the Order to refer is taken out, he ſhall pay no Coſt.

If the Plaintiff does not file his Exceptions in due Time, upon Motion he ſhall have Liberty to except; * for by the Civil Law, the Plaintiff may move that the Defendant may anſwer the *Libellus articulatus*, at any Time before he had replied to the Defendant's Anſwer, to the Poſitions; but when the Plaintiff has ſpecial Leave to except, it is ſaid that if he procures a Report, that the Anſwer is ſhort, yet he ſhall have no Coſt, in regard he did not except in Time; but this has been contradicted, and diſtinguiſhed thus; That if the Defendant had allowed the Exceptions, before the Order to refer was made, that the Plaintiff ſhould have no Coſt; but in regard the Defendant conteſted it, and the Report having gone for the Plaintiff, the Defendant was ordered to pay Coſts.

RULE, 25. The Order of Reference when to be taken out, and the Coſt on filing a further Anſwer, either

By the 25th general Rule, all Exceptions to Anſwers ſhall remain on the file four Days excluſive, before the Order of Reference to one of the Barons, be taken

* But Note in the Caſe of the Executors of *Daunt* againſt *St. Leger*, in this Court, *Eaſter* Term 1759, Exceptions on Counſel's Motion, having been received to an Anſwer which had been filed two Years before, without any Notice given of the Motion, the Court would have ſet them aſide, and alſo the Order for receiving them, as obtained by Surpriſe, and have diſſolved the Injunction obtained by the Plaintiffs, but that the Plaintiffs agreed to give Security to abide the Decree, and not to diſmiſs their Bill.

out;

out; and if no further Anſwer be in that Time, and twenty Shillings Coſt paid, then the Order to be taken out of courſe, and after the Order and Summons from the Baron, are taken out; if the Defendant file a further Anſwer, he is to pay forty Shillings Coſt, though it be before Report.

before, or after the Order and Summons are taken out.

The Coſt of the Report to the Baron, is included in the forty Shillings.

The Order of Reference, is entered, and made out of courſe in the Office.

If the Defendant allows the Exceptions, he is only to anſwer them, and not any other Parts of the Anſwer, not excepted to.

By a late Rule it is ordered, that if a Defendant neglects to attend on a Baron's firſt Summons, he ſhall firſt pay the Plaintiff the Coſt of that Attendance, before he ſhall be heard; and it has been ordered to be taxed, with the Coſts of the Report.

Defendant neglecting to attend on a Baron's firſt Summons, to pay the Coſt thereof before he ſhall be heard.

When the Exceptions are filed to the Defendant's Anſwer, the Plaintiff's Attorney, is to give the Defendant's Attorney Notice thereof, that he may adviſe whether to allow or conteſt them; for otherwiſe the Defendant would have no Benefit of the Time given him by the

Notice to be given of filing the Exceptions.

25th Rule; not knowing of the Exceptions, until ſerved with a Summons to attend the Baron.

In the Caſe of *Beſt* againſt *Leeky* and others, in this Court, *Trinity* 1738, it was determined, that Notice of the Exceptions being filed, ſhould be given to the adverſe Party, four Days before the Order of Reference is moved for.

Plaintiff cannot refer Exceptions to a firſt Anſwer till four Days after they are filed.

The Plaintiff cannot refer Exceptions, to a firſt Anſwer, until four Days after they are filed; but upon a ſecond Anſwer they may be referred immediately.

If the Defendant apprehends the Exceptions are for Delay, he may waive the Time given him by the Rule, and proceed to compel the Plaintiff to procure a Report, or diſcharge the Order of Reference, and diſſolve the Injunction.

If the Defendant apprehends that the Exceptions are for Delay, as to continue an Injunction, *&c.* he may waive the four Days, and may, upon Motion of his Attorney, obtain an Order for the Plaintiff to attend a Baron, ſo as to procure a Report in a ſhort Day, or that the Order of Reference may be diſcharged; and if the Plaintiff neglects to proceed to procure a Report, in four ſitting Days after ſervice of the Order, the Court, upon Motion of the Defendant's Attorney, and on producing the ſaid Order, an Affidavit of the Service thereof, and a Certificate from the Chief Remembrancer of no Report being filed, will diſcharge the Order of Reference abſolutely. And then, if the firſt Rule to diſſolve has been obtained, (which is uſually moved by the Defendant's Attorney on

on the coming in of the Anſwer, and before the Exceptions are filed) on Affidavit of Service of the Order to diſſolve, and Certificate of no Cauſe being ſhewn to the contrary, and on Counſel's Motion thereon, the Injunction ſhall be diſſolved abſolutely; but if the firſt Rule to diſſolve has not been ſo obtained, then the Defendant's Attorney is to move the Rules to diſſolve in the uſual Manner.

The Proceedings are the ſame upon a Re-reference of the Exceptions, where a further Anſwer is filed.

The like Proceedings on a Re-reference.

This is the preſent Practice: See the Caſe of *Bowman* againſt *Bonfield*, *Trin.* 1753: But it is productive of Delay, for which theſe Injunctions are generally calculated, and an unneceſſary Expence to the Defendant in Equity, who is Plaintiff at Law. The former Practice was thus: The Defendant's Attorney upon the Exceptions being filed, might immediately obtain an Order for the Plaintiff to attend a Baron, ſo as to procure a Report in a ſhort Day, or that the Injunction ſhould be diſſolved, and on default thereof, and on Affidavit of Service of the Order, Certificate of no Cauſe, and Motion of Counſel thereon, the Injunction was diſſolved, which ſeems a reaſonable Method of proceeding.

The antient Method of proceeding different, but ſeems reaſonable.

If

When the Report of a full Anſwer is confirmed, Injunction may be diſſolved.

If the Anſwer be reported full, the Injunction ſhall be diſſolved, but not until the Report is confirmed, and then upon Counſel's Motion, it ſhall be diſſolved abſolutely; for the Plaintiff has a Right to except to the Baron's Report, and poſſibly the Exceptions may hold: But note, an Injunction may be raiſed upon the Baron's Report of a ſhort Anſwer, before it is abſolutely confirmed, and the Cauſe of the difference in theſe two Caſes ſeems to be this; That in the one Caſe, the fatality may be greater than in the other; for upon diſſolving the Injunction, the Plaintiff in Equity who is Defendant at Law, may be deprived of his Liberty, and if afterwards the Report ſhould be ſet aſide, the Injury could not be repaired.

But an Injunction may be raiſed on a Baron's Report of a ſhort Anſwer, before it is confirmed.

The Rule for referring Exceptions entered of Courſe.

The Rule to refer the Exceptions is entered of courſe in the Office, at the inſtance of the Plaintiff's Attorney, and there is no limited Time for entering it.

Of anſwering the Argument, or charging Part of the Bill, and the interrogating Part and of excepting to Anſwers in ſuch Caſes.

Upon an Exception to an Anſwer before Lord Chief Baron *Macclesfield*, it it was determined that to Matter of Argument in a Bill, it is not incumbent on the Defendant to make particular Anſwer; neither to anſwer Interrogatories in a Bill, if the ſame be not

not charged before to warrant the ſame Interrogatories.

If a Plea is to ſtand for an Anſwer, without Liberty to except, the Plaintiff may except to the reſt of the Anſwer, *Moſeley's Rep.* 74.

Plea to ſtand for an Anſwer without leave to except, Plaintiff may except to the reſt of the Anſwer.

Where a Defendant anſwers to Part, and pleads to all other Matters not anſwered unto, the Plaintiff cannot put in Exceptions to the Anſwer, till he has firſt argued the Plea, or obtained an Order that the Plea ſhall ſtand for an Anſwer, with Liberty to except to the Matters not pleaded unto. 1 *Vern.* 344. See Page 150, *&c. Title, Anſwer, Demurrer, and Plea.*

Anſwer to Part, and Plea to Reſidue, Plaintiff cannot except to the Anſwer, till the Plea is argued, or that it be ordered to ſtand for an Anſwer with Liberty to except.

If after the Plaintiff hath ſerved the Defendant with Notice of Exceptions being filed, and the four Days for allowing, or conteſting the Exceptions are expired, he delays or neglects to refer them, the Defendant's Attorney may, on Motion, obtain an Order, that the Plaintiff may proſecute his Exceptions and procure a Report in a ſhort Day, or that the Exceptions may be diſcharged; and if in four Days after Service of this Order, the Plaintiff does not take out the Order of Reference, and ſerve the Defendant with a Summons to attend the Baron, the Court, on Affidavit of the Service of the Order, and

How the Defendant is to proceed, if Plaintiff neglects to proſecute the Exceptions.

and the Chief Remembrancer's Certificate of no Report being filed, will, on an Attorney's Motion, diſcharge the Exceptions abſolutely.

The Proceedings on the Reference, when the Defendant does not attend.

The Order of Reference being taken out, and ſhewn to the Baron, or left at his Houſe, or Chambers, with his Clerk, at the Requeſt of the Plaintiff's Attorney, he iſſues a Summons, appointing a Time and Place, uſually his own Chambers, and ſometimes the *Exchequer* Chamber, for the Parties Concerned to attend him, on the Exceptions, taken by the Plaintiff to the inſufficiency of the Defendant's Anſwer; and there being one Summons regularly ſerved, together with the Order of Reference, if the Defendant doth not attend at the Time appointed by the Summons, the Baron will proceed to make his Report of the inſufficiency of the Anſwer, according to the Exceptions then before him; and this is a Report *ex Parte*; and therein, the Baron takes Notice, that he having been attended by the Plaintiff's Counſel and Attorney, and none attending for the Defendant (though duly ſummoned) he reports ſo and ſo: And this Report is not to be excepted to. See *Page* 453.

Report *ex Parte* for the Plaintiff.

Ibidem.

Note, in *Chancery* there muſt be an Affidavit of the Service of three Summonſes produced to the Maſter, before he

he will report *ex Parte*; but in this Court the Baron does not require an Affidavit of the Service of the Summons, but relies on the Averment of the Plaintiff's Attorney for ſuch Service.

The Proceedings where both Parties attend the Baron.

If the Counſel and Attornies for both Parties, attend the Baron at the Time appointed by the Summons, he hears them on the Bill, Anſwer, and Exceptions, and delivers his Opinion in the Preſence of the Parties attending him, on the one Side, or the other, as the Matter appears to him, and afterwards makes his Report; but if there be any Matters of Difficulty in the Caſe, the Bill, Anſwer, and Exceptions are left with the Baron, and he takes Time to conſider thereof.

Ibidem.

If there be more than one Exception, and the Anſwer is ſhort as to the firſt Exception, the Baron proceeds no further, and the Defendant muſt anſwer over to all the Exceptions: So, if the firſt Exception be full, but the Anſwer is ſhort as to the ſecond Exception, then the ſecond Exception, and all the other Exceptions, except the firſt, muſt be anſwered; and this is the conſtant Practice.

And the Proceedings on a *Re-reference*.

And the Barons have ſometimes proceeded in the ſame Manner on a *Re-reference* upon a ſecond Anſwer, and have reported

reported generally, without reporting in what Particulars the Anſwer was ſhort, and ſometimes they have reported ſpecially; but in the Caſe of *Moore* and *Carter* in this Court, *Eaſter* Term 1753, a general Report was made on a *Re-reference* upon a further Anſwer, but this Report on ſolemn Debate was ſet aſide; and it was determined, that on a *Re-reference*, the regular Way is to point out the Matters excepted to, which remain unanſwered, and that for the future in all Orders of *Re-reference*, the Baron be deſired to inſpect the Bill, Anſwer, Exceptions and further Anſwer, and to Report whether the Anſwer be full, and ſufficient in the Points excepted to, or any, and which of them, or not: And the Court declared, they would have it underſtood, that, for the future, upon the *Re-reference*, the Attorney for the Plaintiff ſhall give Notice to the Attorney of the oppoſite Party, of the Exceptions the Plaintiff will rely upon.

The Baron's Report where both Parties attend, and the Proceedings thereon.

And the Report when drawn up and ſigned by the Baron, is given to the Attorney for the Party in whoſe Favour it is made, who may forthwith move the Court for the firſt Rule for confirming the Report.

Ibidem.

By the 26th, Rule *Pars*, it is ſaid, that upon a Motion for confirming a Baron's

Baron's Report, a Rule ſhall be given for confirming the ſame, if Exceptions be not taken, or Cauſe ſhewn within four Days next after ſuch Motion, *Abſque Motione:* But this Rule is partly altered by the preſent Practice; the firſt Rule for confirming a Baron's Report (whether the Report be *ex Parte*, or on the Attendance of the Parties,) being now uſually moved by an Attorney without Notice, and the Order is drawn up that the Report ſhall ſtand confirmed, unleſs good Cauſe be ſhewn to the contrary, in four Days after Service; and a Copy of this Order is to be ſerved on the adverſe Attorney; and if the Exceptions to the Report be not filed, in four ſitting Days after the Service of the Order, then, upon producing the Order with an Affidavit of the Service thereof, and a Certificate from the Chief Remembrancer, that no Exceptions are filed, or Cauſe ſhewn, and upon Motion of the Plaintiff's Attorney thereon, the Court will make the Order for confirming the Baron's Report abſolute.

How the Defendant is to proceed, if the Plaintiff does attend on his Summons.

If the Plaintiff, after he hath ſerved the Defendant with a Summons to attend the Baron, fails to appear, the Court, on Motion of the Defendant's Attorney, will make an Order that the Plaintiff do attend to procure a Report in four Days after Service thereof, or the

the Order of Reference to be diſcharged; and if the Plaintiff doth not within that Time ſerve the Defendant with a ſecond Summons to attend the Baron, the Court, upon being informed thereof by the Defendant's Attorney, and on his producing the ſaid laſt Order, and an Affidavit of the Service thereof, will make the laſt Order abſolute, and Diſcharge the Order of Reference.

Ibidem. If the Plaintiff takes out and ſerves a ſecond Summons on the Defendant, and that the Counſel and Attorney for the Defendant appear at the Return thereof; but the Plaintiff ſtill makes Default, in ſuch Caſe, the Baron will, at the Inſtance of the Defendant, report on the Anſwer and Exceptions; and this is an *ex Parte* Report for the Defendant, and is to be drawn up, and proceeded on, as on a Report *ex Parte*, for the Plaintiff.

Report *ex Parte* for the Defendant.

RULE, The Coſts to be paid on a full or ſhort Anſwer and how recovered.

By the 30th, general Rule, if on Reference to a Baron, of Exceptions to a ſhort Anſwer, the ſame be certified full and ſufficient, the Plaintiff is to pay unto the Defendant forty Shillings Coſts, within two Days after the Report, or an Attachment to iſſue for the ſame, againſt the Plaintiff of courſe: But if it appears by ſuch Report, that the Defendant anſwered ſhort, he is thereupon to pay forty Shillings Coſts, and upon

upon the ſecond ſhort Anſwer three Pounds; and upon the third four Pounds, and for Non-payment thereof Attachments, and other Proceſs of Contempt to iſſue of courſe, and to be committed until he be examined, and anſwer fully to perſonal Interrogatories, touching the Points defective in his Anſwer, and enter into Recognizance to the Plaintiff to perform the Decree of the Court upon the Bill, if the Plaintiff prays the ſame: And no new Exceptions are to be inſiſted on, but what are put in to the firſt Anſwer. And if the Defendant fails to anſwer within four Days after Confirmation of the Report, and pay the Coſts, then Proceſs of Contempt to iſſue of courſe.

On a third ſhort Anſwer, Defendant to be committed and anſwer perſonal Interrogatories.

No new Exceptions.

Defendant to anſwer over in four Days after Report or Proceſs.

This Method of obliging a Defendant, after a third ſhort Anſwer, to anſwer in Cuſtody, is agreeable to the Practice of the Civil Law; for there, if the Defendant, or *Reus* had been examined three Times upon the *Libellus articulatus*, and had not anſwered to the Satisfaction of the Judge, he was contumacious, and it was either taken *pro confeſſo*, or he was obliged to anſwer in *Vinculis*.

Defendant's anſwering in Cuſtody after a third ſhort Anſwer, analogous to the Practice of the Civil Law.

Where the Defendant hath anſwered the Interrogatories, if they be not full, the Interrogatories and Anſwer, are to be referred to a Baron, to report thereon,

Anſwer to the perſonal Interrogatories if apprehended ſhort, they are to be referred to a Baron.

and it was ſo determined in the Caſe of *Smith* againſt *Brianſton*, in this Court, *Eaſter* Term, 1752: And in this Caſe, the Plaintiff's Counſel inſiſted (which the Court did not contradict,) that where a Defendant put in a third ſhort Anſwer, the Plaintiff is not confined to the Exceptions, but may turn the whole Bill into Interrogatories: And it was ſo held in the Caſe of *M'Donnell* againſt *Lynch*, in this Court, *Trinity* Term, 1744.

On a third ſhort Anſwer, the whole Bill may be turned into Interrogatories, the Plaintiff is not confined to the Exceptions.

And to compel a Defendant to put in a further Anſwer to the Bill, where the Anſwer is reported inſufficient, or the Exceptions to the Anſwer are allowed, the Plaintiff is not obliged to ſerve him with a new *Subpœna*; for the Defendant (unleſs he be intitled to a *Dedimus*) is of courſe to anſwer over in four Days, unleſs the Court ſee Reaſon to grant further Time on Application: If he be intitled to a *Dedimus*, he is to move for Time to anſwer until the next following Term, as is before directed. See *Title Anſwers*, &c.

If the Defendant is to put in a further Anſwer, the Plaintiff need not ſerve him with Proceſs, and the Time the Defendant hath to anſwer over.

RULE.

By the 27th general Rule, where a Plaintiff takes Exceptions to the Defendant's Anſwer, and doth not proſecute them at furtheſt by the middle of the next Term, after ſuch Exceptions

Exceptions, if not proſecuted by the middle of the next Term after they are filed, to be over-ruled.

tions were filed, the Court, upon Motion, will thereupon over-rule the ſame.

In the Caſe of *Boyd* againſt *Boyd* and others, in this Court, *Trinity* Term, 1750, the Plaintiff filed Exceptions to the Defendant's Anſwer, after the Time for excepting by the ordinary Rule of the Court was expired, without any ſpecial Order obtained for that Purpoſe: The Defendant referred the Exceptions for Prolixity, and afterwards moved by Counſel to ſet them aſide for Irregularity: But the Court were of Opinion, that the Defendant by referring them for Prolixity, had waived any Irregularity which might have been in filing them, and would make no Rule.

If Exceptions be referred for Prolixity, the Defendant cannot afterwards refer them for irregularity.

If the Plaintiff ſhould move for an Injunction upon Equity, confeſſed in the Defendant's Anſwer, it is ſaid, he cannot afterwards except for inſufficiency; for upon his own Motion he hath admitted an Anſwer which muſt be ſuppoſed to be a full Anſwer, as a ſhort Anſwer is not deemed an Anſwer. *Sed Quær.* But the proper Method, is, firſt to except, and then to give Notice of a Motion for an Injunction on Equity confeſſed, without Prejudice to the Exceptions.

If Plaintiff can except to an Anſwer for inſufficiency, after he hath moved for an Injunction on Equity confeſſed.

By the 30th Rule aforeſaid, the Plaintiff is concluded by his Exceptions, and ſhall not add any new Exceptions to

Plaintiff cannot add to his Exceptions; and has no Remedy but by amending

the Bill, or by diſmiſſing it, and filing a new Bill.

thoſe put in to the firſt Anſwer, ſo that if any Thing material be unanſwered, I ſee no Method the Plaintiff has of being relieved, but by amending his Bill, or by diſmiſſing it, paying Coſt, and filing a new Bill. See *Bunbury's Rep.* 246, where it is ſaid, the Court will not give Leave to amend or add an Exception.

A Caution to be obſerved by the Plaintiff's Attorney, in re-referring on a further ſhort Anſwer, in Caſe the Coſt of the Exceptions, &c. be not paid.

If the further Anſwer be ſhort, the Plaintiff (as has been ſaid before) may re-refer the Exceptions immediately: But note, if the Coſt on allowing of the Exceptions, or of the Baron's Report (as the Caſe is) be not paid, the Plaintiff's Attorney muſt be careful that he enters firſt a Rule to re-refer, without prejudice to the Coſt, as aforeſaid, and then, another Rule in the uſual Way, to re-refer in general.

Where the Time to procure a Report of a ſhort Anſwer is expired before the Attendances are over, and that the Anſwer is ſhort, the Court, on Baron's Certificate, will enlarge the Time.

In the Caſe of *Wright* againſt *Hogan*, in this Court, *Eaſter* Term 1756, it was mentioned by Mr. *Malone*, and agreed to by the Court, that where there is a limited Time for procuring a Report on Exceptions to a ſhort Anſwer, and that there have been Attendances before a Baron, and that the Anſwer does appear to be ſhort in Part, but that the Report cannot be procured in the Time appointed by the Order, that the proper Method is, to get a Certificate from the Baron, that the Anſwer is ſhort in Part,

and

and to move to enlarge the Time for procuring the Report.

Exceptions cannot be taken to an Infant's Anſwer, becauſe he is not bound by it, but may amend it when he becomes of Age. *Bunb.* 338.

No Exceptions to an Infant's Anſwer, and why.

Exceptions to the Baron's Report, and the Proceedings thereon.

ALTHOUGH in this Court the Exceptions to Anſwers, for inſufficiency, are referred to one of the Barons or Judges of the Court; yet, for this Purpoſe, he ſeems to be as it were detached from his judicial Capacity, and to act in this Caſe only as a miniſterial or ſubordinate Officer of the Court; wherefore his Report is not to conclude either Party in this, or any other Caſe whatſoever referred to him; for either Party has a Right to appeal from his Report, to the Judgment of the Court, except it be an *ex Parte* Report, * and this Appeal muſt be by way of Exceptions to the Baron's Report, and ſuch Excep-

The Baron's Report not concluſive, it may be excepted to.

But not if it be a Report *ex Parte*.

* Although Exceptions are not to be taken to the Baron's Report *ex Parte*, yet if it hath been obtained irregularly, or by Surprize, the Court upon Notice, and Motion of Counſel, will relieve the Party.

Exceptions are to be drawn and ſigned by Counſel.

RULE. The Coſt to be paid on excepting to it.

By the latter Part of the 26th general Rule, if Exceptions ſhall be taken to a Baron's Report, the Exceptant is to pay forty Shillings to the Attorney of the other Party, and to depoſite forty Shillings more with the Chief Remembrancer, which is to be paid to the other Party, if the ſame be ruled againſt the Exceptant: But if it be ruled for him, his own Money to be paid back to him; that is to ſay, the forty Shillings depoſited with the Officer, and the forty Shillings paid to the Attorney as aforeſaid. And that all ſuch Exceptions be ſet down of courſe, in the Paper of Cauſes to be argued, within four Days after filing the ſame, giving Notice thereof, as aforeſaid.

The Time for ſetting down the Exceptions to be argued.

The Exceptions to the Baron's Report, to be argued by Counſel.

If Exceptions be taken to the Baron's Report, they are to be argued in Court by Counſel.

RULE. The Time for ſetting down the Exceptions to be argued.

By the 43d general Rule, *pars*, all Exceptions to Reports are to be ſet down to be argued by the Attorney concerned, within four Days after filing thereof, on ſuch Day as the Officer ſhall appoint, or on default of procuring the ſame to be ſet down to be argued, the ſame is

to

to be diſallowed by an * Order to be taken out of courſe without Motion; and the Plaintiff may then take out Proceſs to enforce the Defendant to make an Anſwer, and to pay forty Shillings Coſts.

If not ſet down in Time, to be over-ruled and diſcharged.

The Order for ſetting down the Exceptions to be argued, is to be ſerved on the oppoſite Party four Days, excluſive before the Day of Hearing.

The Order for ſetting down the Exceptions to be ſerved.

No Matters are to be inſerted in the Exceptions to a Baron's Report, but what are offered before the Baron on the Reference.

No Matter to be in the Exceptions not offered before the Baron on the Reference.

Upon hearing Report and Exceptions, where ſome of the Exceptions have been allowed, and ſome over-ruled; it has been ordered, that the Coſt depoſited, ſhould be divided proportionably, according to the Exceptions allowed and over-ruled,

Report and Exceptions, ſome being allowed, and ſome over-ruled, Coſt depoſited to be divided proportionably.

If the Plaintiff excepts to the Anſwer, and the Exceptions are referred, and the Baron certifies the Anſwer inſufficient in the Points excepted to, and then

If a firſt Anſwer be reported inſufficient, though Exceptions exceed the Charges in the Bill, yet

* This Part of the Rule is altered by the preſent Practice; for now the Attorney for the Party in whoſe favour the Report is, moves the Court to have the Exceptions over-ruled, and diſcharged, upon Certificate that they are not ſet down to be argued.

Defendant muſt anſwer the Exceptions, if he does not except to the Report.

then the Defendant fully anſwers the Charges of the Bill, and it happen that the Exceptions exceed the Charges, and the Baron upon a Reference of a ſecond Anſwer, reports that inſufficient likewiſe, in the Points excepted to, and the Defendant excepts to the Report, and inſiſts that he had anſwered well, having anſwered all the Matters of the Bill, yet he is alſo to anſwer all the Matters of the Exceptions, as well as of the Bill, he not having excepted to the firſt Report. *Criſp* againſt *Nevil.* 1 *Cha. Ca.* 60.

Joint and ſeveral Anſwers reported inſufficient, two of the Defendants waive Exceptions, third Defendant may have his argued.

Three Defendants put in joint and ſeveral Anſwers, which are reported inſufficient, two of them waive Exceptions, the other inſiſts upon having his argued, allowed. *Ayl.* 46. 2 *Har. Ch. Pract.* 437. 2 Edit.

If the Baron reports the Anſwer inſufficient in one ſingle Exception, the Defendant muſt either ſubmit to anſwer or except to the Baron's Report.

If the Baron reports the Anſwer inſufficient in one ſingle Exception, the Defendant muſt either except to the Report, or ſubmit to anſwer according to the Report; if he doth not except, but ſubmits to anſwer over, he muſt take Care to put in a full Anſwer, for having once ſubmitted to Anſwer over, he hath allowed the Judgment of the Baron to be good againſt him; and in this Caſe, he ſhall not inſiſt by his ſecond Anſwer that he ought not to anſwer the Exception; nor ſhall he (in the Caſe of a ſingle Exception) after he has

has ſo ſubmitted to anſwer over, except to the Report, and bring it on for the Judgment of the Court, whether he ought to anſwer over or not; for this he might, and ought to have done at firſt; and there he would have had the Opinion of the Court, whether his firſt Anſwer had been good or not, which upon his ſecond Anſwer he can never have; becauſe he hath concluded himſelf by ſubmitting to Anſwer according to the Report.

In ſome Caſes the above Rule may be diſpenſed with, and the Defendant after he has anſwered, may get Leave to except to the Baron's Report.

But it is conceived, this Rule does not hold good in all Caſes; for where the Baron reports the Anſwer inſufficient in four, five, or more Exceptions, it often falls out that one or two of theſe Exceptions are fatal on the Party, and ſo they would appear, if the Party excepted to the Report; and therefore, in this Caſe, the Party may ſubmit to anſwer over to ſuch Exceptions, which he knows to be againſt him; but as to the others, if he is adviſed his firſt Anſwer is full in thoſe Points; or if they are of ſuch a Nature as ought not to be anſwered, or are altogether immaterial, the Defendant may in this Caſe, (and notwithſtanding he hath put in a further Anſwer) afterwards except to the Baron's Report, and have the Opinion of the Court thereon; and it was never held, that he was, in that Caſe, concluded by the Report, or bound to anſwer according to the Report.

Where

If the Court be of Opinion that the Defendant ought to anſwer the firſt, ſecond, or third Exceptions, they ſeldom go on any further, but make the Defendant anſwer.

Where a Baron reports an Anſwer inſufficient, in four, five, ſix, or ſeven, or more Exceptions, and the Party excepts to the Report, if upon arguing thereof, the Court are of Opinion, that the Defendant ought to anſwer the firſt, ſecond, or third, they rarely go on any further; for if any one Exception proves fatal, and muſt be anſwered, the Court ſeldom trouble themſelves to go into the other Exceptions, but uſually ſay, let the Party anſwer according to the Report, or at his Peril: But yet there may be ſome Caſes, where the Court will indulge the Party to go into the reſt of the Exceptions; as if the Defendant's Counſel admit one Exception to be againſt them, and yet ſtrongly inſiſt there is nothing in any of the other Exceptions; in this Caſe, (though rarely) the Court will enter into the Merits of the reſt of the Exceptions; but if they do not, yet it is conceived, that the Party is only bound to anſwer ſuch as he knows to be againſt him; and that if his ſecond Anſwer is reported againſt him, he may except and demand the Judgment of the Court, whether his ſecond Anſwer is good and ſufficient; and it was never thought, that the Party was in all Events, bound to anſwer according to the Report, or to be concluded thereby.

Where the Defendant inſiſts that he ought not, or is not

There are other Caſes, where Exceptions are taken to the Anſwer, and where

where the Party hath not anſwered them at all, but inſiſts on his Right, and that he is not bound, or ought to anſwer them; and in this Caſe the Baron generally reports, according to the Exceptions; becauſe he will not take upon himſelf to judge how far the Defendant ought, or ought not to anſwer, but leave it to be determined by the Court; and when it comes on upon an Exception, the Court frequently diſpenſes with the Defendant's not anſwering the Exceptions, eſpecially where they appear to be immaterial or in Matters of Title.

bound to anſwer the Exceptions, the Baron will report according to the Exceptions, and leave it to be determined by the Court, if the Defendant ought or ought not to anſwer.

If the Court are of Opinion, againſt the Baron's Report, on hearing the Exceptions to it, the Report is not ſet aſide; the Courſe is to re-refer the Exceptions to the Defendant's Anſwer to the Baron: So agreed in the Caſe of *Wright* againſt *Hogan* in this Court, *Eaſter* Term, 1756.

Baron's Report, not to be ſet aſide, but the Exceptions to the Anſwer to be re-referred.

Where, upon Exceptions to Anſwers, the Court are equally divided, the Exceptions are over-ruled of courſe. *Bunb. Rep.* 47.

Court divided Exceptions, over-ruled of courſe.

Exhibits.

Exhibits.

Exhibit what.

WHERE a Deed or other Writing is in a Suit in *Chancery* exhibited to be proved by Witneſſes, and the Examiner, or Commiſſioner appointed certifies on the Back of it, That the Deed or Writing was ſhewn to the Witneſs to prove it, at the Time of his Examination, and by him ſworn to; this is called an Exhibit.

What is to be obſerved in exhibiting Writings, &c.

And where Letters or other Papers, or Writings are by the Bill required to be viewed, and indorſed by the Defendant, and he to ſet forth whether the Name ſubſcribed thereto be his Hand-writing, or the Hand-writing of another, theſe are alſo called Exhibits; and the Plaintiff's Attorney, or Commiſſioner need not let the Defendant ſee or peruſe one Word more of the Letter, or Paper than juſt the Name; but the uſual Practice is, that the whole Letter or Paper is ſhewn to the Defendant, and he, or his Attorney, is permitted to take an Abſtract of the Date, Parties, and Purport of the Exhibit.

And

And note, a Letter or any other Writing proved by the Anſwer of a Defendant, can only be read againſt that Defendant, and cannot be read againſt any other Defendant in the Cauſe, unleſs proved by Depoſitions.

Any Writing proved by the Anſwer of a Defendant, to be Evidence againſt that Defendant only.

Where the Witneſſes to a Deed are dead, it cannot be proved *viva Voce* by Similitude of Hands; in this Caſe, it muſt be by an Interrogatory: Nor can a Letter, or a Receipt, or any other Writing be proved *viva Voce* by Similitude of Hands as an Exhibit, unleſs it has a living Witneſs to it; it muſt be alſo proved by an Interrogatory; for the Proof by Similitude of Hands is uncertain, and may be conteſted, which would take up too much of the Time of the Court: So determined in the Caſe of *Row* againſt *Creagh* and others, on the Hearing in the *Exchequer*, *Hillary Term*, 1748.

Witneſſes to a Deed, &c. dead, the Deed to be proved by an Interrogatory, and a Letter &c. cannot be proved *viva Voce* by Similitude of Hands.

The Plaintiff had an Order to prove a Deed *viva Voce* at the Hearing; it happened that all the Witneſſes to the Deed were dead, and the Plaintiff produced a Witneſs at the Hearing to prove their Hands, but this he was not permitted to do; but the Maſter of the Rolls put off the Cauſe, and

Ibidem.

gave

gave Liberty to examine in the Office to prove the Deed, notwithſtanding Publication had paſſed. *Preced. in Chanc.* 64.

A Will of Land not to be proved as an Exhibit.

It is alſo held, that no Will of Land ſhall be proved as an Exhibit. *Bunb. Rep.* 310.

Depoſitions made uſe of on the Hearing, and Exhibits proved *viva Voce* ſaving Exceptions.

But the Execution only to be proved.

It is often neceſſary to have the Liberty to make uſe of Depoſitions on the Hearing, ſaving Exceptions; ſo it is to prove Exhibits, as Deeds, Copies of Records, Notes, *&c.* which the Court will grant upon an Attorney's Motion; and yet nothing but the Execution of them ſhall be proved *viva Voce*; becauſe as the Witneſs might have ſeen the Depoſitions it might be an Inlet to Perjury. *Moſeley's Rep.* 381.

Cauſe adjourned and Liberty to prove Exhibits *viva Voce.*

The Court has adjourned the Cauſe on the Hearing, and have given leave to prove Exhibits *viva Voce*; but ordered that they ſhould be particularly ſet forth in the Order, and that it ſhould be ſerved on the adverſe Party.

The order to prove Exhibits to be ſerved before the Hearing.

It ſhould ſeem proper that the Order to prove Exhibits, wherein the Papers to be made uſe of are particularly inſerted, ſhould be ſerved on the

oppoſite

oppoſite Attorney, ſome convenient Time before the Hearing.

With regard to examining Witneſſes, *viva Voce* to prove Exhibits, it is incumbent on the Party who is to examine, to produce his Witneſſes in Court at the Hearing, (having firſt obtained an Order for that Purpoſe) and alſo the Exhibits, which are delivered together with the Order to the Officer, and the Court examines the Witneſſes accordingly. Proceedings on proving Exhibits *viva Voce* on the Hearing.

And the Exhibits to be proved, muſt be particularly mentioned in the Order, and they may be proved at any Time after the Cauſe is ſet down to be heard, the Crier having firſt called the Cauſe. And the Attorney for the oppoſite Party is to attend; if he does not, the Court will order him to attend ſitting the Court, or they will attach him. But note, the Order muſt be ſerved on him four Days at leaſt, before the Day of proving the Exhibits, and an Affidavit thereof ready to produce to the Court. Ibidem.

Exhibits proved by Depoſitions, muſt be ſhewn at the Hearing, if the Party would have any Benefit by them. *Treatiſe of Equity*, 123. See *Title, Witneſſes*, &c. Exhibits proved by Depoſitions, to be ſhewn at the Hearing.

The Court will not grant an Order to prove Exhibits at the Hearing of Exceptions to a Report.

A Motion was made for an Order to prove an Exhibit *viva Voce* on the Hearing of Exceptions to a Maſter's Report; but the Maſter of the Rolls denied the Motion, and ſaid, that no ſuch Order was ever made; becauſe on arguing Exceptions you can argue nothing new, that was not before the Maſter. *Moſeley's Rep.* 191.

MVSEVM
BRITANNICVM

The End of the firſt Volume.